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The 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances –A Ten Year Perspective: Is International Cooperation Merely Illusory?

Jimmy Gurule

Abstract

On the ten-year anniversary of the adoption of the 1988 U.N. Drug Convention, this Article analyzes whether signatory- parties have complied with the duties and obligations imposed thereunder, and, in particular, whether the Convention has enhanced international cooperation in narcotics enforcement. Part I of this Article examines the legal obligations and duties imposed under the 1988 U.N. Drug Convention, with special emphasis on the provisions aimed at criminalizing money laundering and at forfeiture of illicit drug proceeds and instrumentalities of narcotics trafficking. Additionally, Part I examines the requirement that parties afford one another the “widest measure of mutual legal assistance in [narcotics] investigations, prosecutions, and judicial proceedings,” and whether signatories to the Convention are in compliance with this obligation. Part II analyzes whether foreign countries are in compliance with the obligations imposed by the 1988 U.N. Drug Convention to enact domestic anti-money laundering legislation and to assist one another in drug forfeiture proceedings. Part III scrutinizes U.S. compliance under the Convention, focusing on domestic legislation criminalizing international money laundering and authorizing forfeiture of foreign drug proceeds found in the United States, as well as forfeiture of property located abroad. Part III then examines whether these domestic criminal provisions have been aggressively implemented. Finally, Part IV examines whether enforcement of the 1988 U.N. Drug Convention should be pursued through the International Court of Justice and whether compliance should be encouraged through international asset sharing.

THE 1988 U.N. CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES—A TEN YEAR PERSPECTIVE: IS INTERNATIONAL COOPERATION MERELY ILLUSORY?

*Jimmy Gurulé**

INTRODUCTION

Modern crime is international in nature and transcends national borders. This fact is particularly true in the case of international narcotics trafficking, where drug dealers often have extensive ties in foreign countries. For example, coca, the raw material for cocaine, is grown exclusively in the South American countries of Bolivia, Colombia, and Peru. Narcotics cartels operate plantations in Peru's Upper Huallaga Valley, the world's largest source of coca, as well as plantations in Bolivia and Colombia.¹ At the same time, Mexico has become the gateway for the importation of cocaine into the United States. Over seventy percent of the cocaine distributed in the United States enters through the United States-Mexico border.² Moreover, the con-

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1. See OFFICE OF NAT'L DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL STRATEGY, 1998, A TEN YEAR PLAN 49 [hereinafter DCS]. Bolivia and Colombia are the world's second and third leading producers of cocaine hydrochloride. Bolivia produces over a quarter of the world's coca leaf and about 30 percent of its cocaine supply. See U.S. DEP'T OF STATE, BUREAU FOR INT'L NARCOTICS AND LAW ENFORCEMENT AFFAIRS, INTERNATIONAL NARCOTICS CONTROL STRATEGY REPORT, 1997, at 16 (Mar. 1998) [hereinafter INCS REPORT]. "Colombia remains the world's leading distributor of cocaine and an important supplier of heroin and marijuana." *Id.* While there has been some progress in reducing the coca production in Bolivia and Peru over the last two years, this has been offset by a 56 percent expansion in coca cultivation in Colombia during that same period. See DCS, *supra*, at 49.

2. See INCS REPORT, *supra* note 1, at 10. The International Narcotics Control Strategy Report sets forth the following:

Mexico now rivals Colombia as the center of the Western Hemisphere drug trade. Mexican drug syndicates have divided up the territory with the Colombian organizations, gradually assuming responsibility for the wholesale distribution of most of the cocaine moving to the United States.

Id. at 10. Mexico also accounts for as much as 20 percent of the U.S. heroin market.

tinued flow of cocaine and other illicit drugs into the United States poses a fundamental threat to the domestic and foreign interests of the United States.³

While illegal drugs are imported into the United States from other countries, the enormous profits generated from drug trafficking are frequently transferred out of the country and deposited into bank accounts in other countries⁴ to avoid seizure by U.S. law enforcement authorities and forfeiture by U.S. courts. The schemes to launder drug money are sophisticated and "it is not unusual to find an intricate web of domestic and foreign bank accounts, dummy corporations and other business entities through which funds are moved, almost instantaneously, by means of electronic transfers."⁵ This pattern of importing illicit drugs into the United States from abroad and laundering drug proceeds by transferring money outside the United States to bank accounts in other countries has become the *modus operandi* for international drug traffickers.

The headquarters for the most notorious international drug cartels are located outside the United States where drug kingpins often operate with impunity and without fear of apprehension and criminal prosecution. The leaders of these drug syndicates avoid entry into the United States altogether, knowing that they run a much greater risk of being arrested in the United States than abroad, and, if arrested, cannot bribe their way to freedom.

In order to apprehend and to prosecute these international drug offenders successfully, law enforcement officials must abandon traditional techniques in favor of bold and innovative counter-narcotics strategies. Any such initiative must include two principal components. First, this new law enforcement strat-

See U.S. DEP'T OF STATE, INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT: 1997 COUNTER-NARCOTICS STRATEGY 3 [hereinafter COUNTER-NARCOTICS STRATEGY].

3. Based on recent accounts, the retail value of the cocaine available for consumption in the United States each year is between US\$40 and US\$52 billion. See DCS, *supra* note 1, at 46.

4. For example, money is often transferred into accounts in Luxembourg, Panama, the Bahamas, and the Cayman Islands. See Scott Sultzer, *Money Laundering: The Scope of the Problem and Attempts to Combat It*, 63 TENN. L. REV. 143, 191 (1995) (explaining that Panama, Bahamas, and Cayman Islands are offshore banking havens).

5. Jimmy Gurulé, *The Money Laundering Control Act of 1986: Creating a New Federal Offense or Merely Affording Federal Prosecutors an Alternative Means of Punishing Specified Unlawful Activity?*, 32 AM. CRIM. L. REV. 823, 854 n.3 (1995) (citations omitted).

egy must be international in scope.⁶ Specifically, U.S. law enforcement officials must aggressively pursue investigations abroad with the cooperation of other country's law enforcement officials. Second, it has long been recognized that "if law enforcement efforts [directed at international organized crime] are to be successful, they must include an attack on the economic aspects" of drug trafficking and other related crimes.⁷

A report recently released by the U.S. State Department's, Bureau of International Narcotics and Law Enforcement Affairs makes a compelling case for severely punishing money laundering activity:

Money laundering has devastating social consequences and is a threat to national security because money laundering provides the fuel for drug dealers, terrorists, arms dealers, and

6. See United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf. 82/16, *reprinted in* 28 I.L.M. 493 (1988) [hereinafter U.N. Drug Convention]. The preamble of the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances ("U.N. Drug Convention" or "Convention") recognizes the importance of international cooperation in combating drug trafficking. It provides that "eradication of illicit traffic is a collective responsibility of all States and that, to that end, coordinated action within the framework of international cooperation is necessary." U.N. Drug Convention, *supra*, U.N. Doc. E/Conf. 82/16, at 1-2 (The preamble is not reprinted in I.L.M., but is available in U.N. Doc. E/Conf. 82/15); see DCS, *supra* note 1, at 44 ("Because traffickers do not respect national borders, no country can deal effectively with illicit drug trafficking alone. Multinational efforts are essential for making optimal use of limited assets.").

7. S. REP. NO. 98-225, at 191 (1984), *reprinted in* 1984 U.S.C.C.A.N. 3182 (discussing legislation to strengthen criminal forfeiture laws). In enacting the Racketeer Influenced and Corrupt Organizations Act ("RICO"), the U.S. Congress realized that any strategy intended to combat organized crime successfully must include an attack on the enormous profits generated by organized crime, as well as their infiltration into legitimate businesses. See Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (1994). Senator McClellan, a chief sponsor of RICO, posited that:

What is needed . . . are new approaches that will deal not only with individuals, but also with the economic base through which those individuals constitute such a serious threat to the economic well-being of the Nation [A]n attack must be made on their source of economic power itself, and the attack must take place on all available fronts.

See S. REP. NO. 91-617, at 79 (1969) (citations omitted); see also Lowell Quillen, *The International Attack on Money Laundering: European Initiatives*, 1991 DUKE J. COMP. & INT'L L. 213, 213 (1991). Quillen posits that:

After years of failed efforts to curb either supply or demand, international drug enforcement authorities have determined that the best way to cripple the \$300 billion drug industry is to attack the drug traffickers' profit motive. Without the ability to transfer and disguise their enormous gains, drug cartels could operate only at a small fraction of current levels.

Quillen, *supra*.

other criminals to operate and expand their criminal enterprises. In doing so, criminals manipulate financial systems in the United States and abroad. Unchecked, money laundering can erode the integrity of a nations' financial institutions. Due to the high integration of capital markets, money laundering can also negatively affect national and global interest rates as launderers reinvest funds where their schemes are less likely to be detected rather than where rates of return are higher because of sound economic principles. Organized financial crime is assuming an increasingly significant role that threatens the safety and security of peoples, states, and democratic institutions. Moreover, our ability to conduct foreign policy and to promote our economic security and prosperity is hindered by these threats to our democratic and free-market partners.⁸

Thus, any effective anti-drug strategy must: (1) criminalize money laundering and (2) deprive drug traffickers of their illicit drug profits through the enforcement of tough asset forfeiture laws. Furthermore, both of these objectives must be aggressively pursued on an international scale. Otherwise, "without cooperation among all nations affected by illegal drug activity, traffickers can defeat domestic forfeiture laws simply by removing their illicit wealth from the jurisdiction in which it is generated."⁹

The United States is party to several multilateral and bilateral treaties intended to foster international cooperation in narcotics enforcement.¹⁰ The most important of these international anti-drug conventions is the 1988 U.N. Convention Against Illicit

8. See INCS REPORT, *supra* note 1, at 2.

9. William J. Snider, *International Cooperation in the Forfeiture of Illegal Drug Proceeds*, 6 CRIM. L.F. 377, 378 (1995).

10. See, e.g., Single Convention on Narcotic Drugs of 1961, Mar. 30, 1961, 18 U.S.T. 1407, 520 U.N.T.S. 204 (entered into force Dec. 13, 1964) [hereinafter Single Convention]; Protocol Amending the Single Convention, Mar. 25, 1972, 26 U.S.T. 1439, 976 U.N.T.S. 3 (entered into force Aug. 8, 1975) [hereinafter Geneva Protocol]; Convention on Psychotropic Substances, Feb. 2, 1971, 32 U.S.T. 543, 1019 U.N.T.S. 175 (entered into force Aug. 16, 1976) [hereinafter Psychotropic Convention].

The United States is a party to several other multilateral conventions intended to foster international cooperation in confronting terrorism and other violent crimes. See, e.g., International Convention Against the Taking of Hostages, Dec. 17, 1979, 1316 U.N.T.S. 205, 18 I.L.M. 1456 (entered into force June 3, 1983) (entered into force for the United States Dec. 7, 1984); Convention on Offenses and Certain Other Acts Committed on Board Aircraft, 1963, 20 U.S.T. 2941, 704 U.N.T.S. 219 (entered into force Dec. 4, 1969) [hereinafter Tokyo Convention]; Convention for the Suppression of Unlawful Seizure of Aircraft, Dec. 16, 1970, 22 U.S.T. 1641, 860 U.N.T.S. 105 (entered into force Oct. 14, 1971) [hereinafter Hague Convention]; Convention for the Suppression

Traffic in Narcotic Drugs and Psychotropic Substances ("1988 U.N. Drug Convention" or "Convention").¹¹ "The purpose of this Convention is to promote cooperation among the Parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension."¹² In many cases, however, foreign nations have been reluctant, or simply unwilling, to comply with the obligations imposed under the Convention. With respect to the United States, federal prosecutors, for whatever reason, have failed to utilize effectively the full panoply of legal tools authorized to implement the Convention. Money laundering prosecutions in the United States have been predominantly domestic in scope. Emphasis on domestic investigations and prosecutions at the expense of international cooperative efforts is a prescription for failure and will ensure the continued growth and proliferation of international drug trafficking and organized crime.

On the ten-year anniversary of the adoption of the 1988 U.N. Drug Convention, this Article analyzes whether signatory-parties have complied with the duties and obligations imposed thereunder, and, in particular, whether the Convention has enhanced international cooperation in narcotics enforcement. Part I of this Article examines the legal obligations and duties imposed under the 1988 U.N. Drug Convention, with special emphasis on the provisions aimed at criminalizing money laundering and at forfeiture of illicit drug proceeds and instrumentalities of narcotics trafficking. Additionally, Part I examines the requirement that parties afford one another the "widest measure of mutual legal assistance in [narcotics] investigations, prosecutions, and judicial proceedings,"¹³ and whether signatories to the Convention are in compliance with this obligation.

Part II analyzes whether foreign countries are in compliance with the obligations imposed by the 1988 U.N. Drug Convention to enact domestic anti-money laundering legislation and to assist one another in drug forfeiture proceedings. Part III scrutinizes U.S. compliance under the Convention, focusing on domestic legislation criminalizing international money laundering and au-

of Unlawful Acts Against the Safety of Civil Aviation, Sept. 23, 1971, 24 U.S.T. 565 (entered into force Jan. 26, 1973) [hereinafter Montreal Convention].

11. See U.N. Drug Convention, *supra* note 6, 28 I.L.M. 493.

12. *Id.* art. 2(1), 28 I.L.M. at 500.

13. *Id.* art. 7(1), 28 I.L.M. at 508.

thorizing forfeiture of foreign drug proceeds found in the United States, as well as forfeiture of property located abroad. Part III then examines whether these domestic criminal provisions have been aggressively implemented. Finally, Part IV examines whether enforcement of the 1988 U.N. Drug Convention should be pursued through the International Court of Justice and whether compliance should be encouraged through international asset sharing.

I. THE 1988 U.N. CONVENTION AGAINST ILLICIT TRAFFIC IN NARCOTIC DRUGS AND PSYCHOTROPIC SUBSTANCES

Deeply concerned by the magnitude of and rising trend in the illicit production of and trafficking in narcotic drugs, and cognizant that this trend could only be reversed through "coordinated action within the framework of international cooperation,"¹⁴ the U.N. Commission on Narcotic Drugs convened a conference in Vienna, Austria from November 25 to December 20, 1988, to consider the adoption of a multilateral treaty to combat international drug trafficking. The treaty was intended to supplement and to reinforce several earlier U.N. measures contained in the 1961 Single Convention on Narcotic Drugs,¹⁵ as amended by the 1972 Protocol,¹⁶ and the 1971 Convention on Psychotropic Substances.¹⁷ The result of the conference was the adoption of the 1988 U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances.¹⁸ To date, more than 150 countries are parties to the 1988 U.N. Drug Conven-

14. See U.N. Drug Convention, *supra* note 6, pmbl., U.N. Doc. E/Conf. 82/16, at 2.

15. Single Convention, *supra* note 10.

16. Geneva Protocol, *supra* note 10.

17. Psychotropic Convention, *supra* note 10.

18. U.N. Drug Convention, *supra* note 6. At the signing ceremony on December 20, 1988, the following nations signed the Convention: Afghanistan, Algeria, Argentina, the Bahamas, Bolivia, Brazil, Canada, Chile, China, Colombia, Ivory Coast, Cyprus, Denmark, Egypt, Ghana, Guatemala, the Holy See, Honduras, Iran, Israel, Italy, Jordan, Malaysia, Mauritania, Mauritius, Nicaragua, Norway, Panama, Paraguay, Peru, the Philippines, Senegal, Spain, Suriname, Sweden, Turkey, the United Kingdom, the United Republic of Tanzania, the United States, Venezuela, Yemen, Yugoslavia, and Zaire. See *U.N. Web Page on the 1988 U.N. Drug Convention* (visited Oct. 10, 1998) <http://www.un.org/Depts/Treaty/final/ts2/newfiles/part_boo/vi_bo o/vi_19.html> (on file with the *Fordham International Law Journal*) [hereinafter *U.N. Web Page*] (providing list of signatories and parties to 1988 U.N. Drug Convention with respective dates of signature). Morocco signed on December 28, 1988. *Id.*

It should be emphasized that the U.S. Constitution provides that treaties as well as executive agreements are incorporated into the body of U.S. law, making them enforce-

tion.¹⁹

The 1988 U.N. Drug Convention is expansive in scope and coverage. It establishes internationally-recognized offenses relating to drug trafficking and money laundering that are to be criminalized under the domestic laws of the parties to the Convention. It also creates a framework for international cooperation to bring to justice those persons who profit from drug trafficking.²⁰ The Convention further requires each party to enact far-reaching domestic laws providing for the "confiscation," defined as freezing, seizing, and forfeiting, of drug proceeds or instrumentalities used, intended to be used, or derived from proscribed drug trafficking activities.²¹

The central purpose of the 1988 U.N. Drug Convention is set forth in Article 2 of the Convention, which provides: "The

able. U.S. CONST. art. VI, § 2, art. II, § 1; *United States v. Pink*, 315 U.S. 203, 230 (1942).

19. The following nations are parties to the 1988 U.N. Drug Convention: Afghanistan, Algeria, Antigua and Barbuda, Argentina, Armenia, Australia, Austria, Azerbaijan, the Bahamas, Bahrain, Bangladesh, Barbados, Belarus, Belize, Belgium, Benin, Bhutan, Bolivia, Bosnia and Herzegovina, Botswana, Brazil, Brunei Darussalam, Bulgaria, Burkina Faso, Burundi, Cameroon, Canada, Cape Verde, Chad, Chile, China, Colombia, Costa Rica, Croatia, Cuba, Cyprus, the Czech Republic, the Democratic Republic of the Congo, Denmark, Dominica, the Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, the European Community, Fiji, Finland, France, Gabon, Gambia, Georgia, Germany, Ghana, Greece, Grenada, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, the Holy See, Honduras, Hungary, Iceland, India, Indonesia, Iran, Ireland, Israel, Italy, the Ivory Coast, Jamaica, Japan, Jordan, Kazakhstan, Kenya, Kuwait, Kyrgyzstan, Latvia, Lebanon, Lesotho, Libyan Arab Jamahiriya, Luxembourg, Macedonia, Madagascar, Malawi, Malaysia, Maldives, Mali, Malta, Mauritania, Mauritius, Mexico, Monaco, Morocco, Myanmar, Nepal, the Netherlands, New Zealand, Nicaragua, Niger, Nigeria, Norway, Oman, Pakistan, Panama, Paraguay, Peru, the Philippines, Poland, Portugal, Qatar, the Republic of Moldova, Romania, the Russian Federation, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, São Tomé and Príncipe, Saudi Arabia, Senegal, the Seychelles, Sierra Leone, Singapore, Slovakia, Slovenia, Spain, Sri Lanka, Sudan, Suriname, Swaziland, Sweden, Switzerland, Syrian Arab Republic, Tajikistan, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkey, Turkmenistan, Uganda, Ukraine, the United Arab Emirates, the United Kingdom, the United Republic of Tanzania, the United States, Uruguay, Uzbekistan, Venezuela, Vietnam, Yemen, Yugoslavia, Zambia, and Zimbabwe. *U.N. Web Page*, *supra* note 18.

20. See David P. Stewart, *Internationalizing the War on Drugs: The U.N. Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances*, 18 *DENV. J. INT'L L. & POL'Y* 387, 387 (1990) (providing excellent summary of more important provisions of 1988 U.N. Drug Convention).

21. The preamble to the U.N. Drug Convention expressly addresses this concern: "Determined to deprive persons engaged in illicit traffic of the proceeds of their criminal activities and thereby eliminate their main incentive for so doing . . ." See U.N. Drug Convention, *supra* note 6, pmbl, U.N. Doc. E/Conf. 82/16, at 1.

purpose of this Convention is to promote co-operation among parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension."²²

To that end, Article 3(1)(a) obliges each party to establish as criminal offenses under its domestic law a comprehensive list of activities involved in or related to drug trafficking, including: the production, manufacture, distribution, cultivation, possession, or purchase of any narcotic drug or psychotropic substance, as well as the manufacture, transportation, or distribution of any equipment, materials, or substances knowing that they are to be used to manufacture illicit drugs.²³ In addition, each party is required to criminalize the organization, management, or financing of the drug offenses enumerated in the Convention.²⁴

Article 3(1)(b) requires each party to enact domestic legislation criminalizing money laundering activity.²⁵ For purposes of the Convention, money laundering is defined as:

(i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with subparagraph (a) of this paragraph . . . , for the purpose of concealing or disguising the illicit origin of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions; [and]

(ii) The concealment or disguise of the true nature, source, location, disposition, movement, rights with respect to, or ownership of property, knowing that such property is derived from an offence or offences established in accordance with subparagraph (a) of this paragraph²⁶

Failure to enact domestic legislation criminalizing efforts aimed at concealing or disguising the illicit source of drug and money laundering proceeds constitutes non-compliance under the Convention.²⁷

22. U.N. Drug Convention, *supra* note 6, art. 2, 28 I.L.M. at 500.

23. *Id.* art. 3(1)(a)(i)-(iv), 28 I.L.M. at 500-501.

24. *Id.* art. 3(1)(a)(v), 28 I.L.M. at 501.

25. This obligation is new and not required by either the Single Convention on Narcotic Drugs of 1961 ("Single Convention"), *supra* note 10, or the Protocol Amending the Single Convention ("Geneva Convention"), *supra* note 10.

26. *See* U.N. Drug Convention, *supra* note 6, art. 3(1)(b)(i)-(ii), 28 I.L.M. at 501.

27. *Id.* art. 5, 28 I.L.M. at 504.

Article 5 is particularly important and imposes several duties on parties to the Convention. Pursuant to Article 5, parties shall adopt such measures as may be necessary to enable confiscation of drug trafficking and money laundering proceeds, as well as the instrumentalities used to commit such offenses.²⁸ Under this provision, each party is obliged to enact domestic legislation to permit forfeiture of:

- (a) Proceeds derived from offences established in accordance with Article 3, Paragraph 1, or property, the value of which corresponds to that of such proceeds; [and]
- (b) Narcotic drugs and psychotropic substances, materials and equipment or other instrumentalities used in or intended for use in any manner in offences established in accordance with Article 3, Paragraph 1.²⁹

28. The Convention uses the term "confiscation." Article 1(f) defines "confiscation" as "the permanent deprivation of property by order of a court or other competent authority." This definition includes forfeiture where applicable. *See id.* art. 1(f), 28 I.L.M. at 499. It should further be noted that the duty of confiscation is not new under treaty-based law. *See* Convention for the Suppression of the Illicit Traffic in Dangerous Drugs, Oct. 26, 1939, art. 10, 198 U.N.T.S. 299, 305 (imposing first duty of confiscation). The duty of seizure and confiscation is also mandated by Article 37 of the Single Convention. Article 37 provides: "Any drugs, substances and equipment used in or intended for the commission of any of the offences, referred to in Article 36, shall be liable to seizure and confiscation." Single Convention, *supra* note 10, art. 37, 18 U.S.T. at 1426, 520 U.N.T.S. at 254.

29. U.N. Drug Convention, *supra* note 6, art. 5, 28 I.L.M. at 504. In addition to forfeiting drug proceeds, property traceable to such proceeds is forfeitable under the U.N. Drug Convention. Article 5(6)(a) of the Convention provides that "[i]f proceeds have been transformed or converted into other property, such property shall be liable to the measures referred to in this article instead of the proceeds." *Id.* art. 5(6)(a), 28 I.L.M. at 506. Thus, if drug proceeds have been commingled with property acquired from a legitimate source, the Convention provides that "such property shall . . . be liable to confiscation up to the assessed value of the intermingled proceeds." *Id.* art. 5(6)(b), 28 I.L.M. at 506. Additionally, income or other benefits derived from: (i) proceeds, (ii) property into which proceeds have been transformed or converted, or (iii) property with which proceeds have been intermingled shall be forfeitable in the same manner and to the same extent as proceeds. *Id.* art. 5(6)(c), 28 I.L.M. at 506. The Convention further preserves the rights of innocent *bona fide* third parties. *Id.* art. 5(8), 28 I.L.M. at 507.

It should be noted that the Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime ("European Laundering Convention") also imposes a duty on the parties to "adopt such legislative and other measures as may be necessary to enable it to confiscate instrumentalities and proceeds or property" of crime. Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime, Nov. 8, 1990, art. 2, 30 I.L.M. 148, 150 [hereinafter European Laundering Convention]. On November 8, 1990, the European Laundering Convention was signed by the representatives of the following countries: Belgium, Cyprus, Denmark, the Federal Republic of Germany, Iceland, Italy, the

It should be emphasized that the existence of bank secrecy laws does not constitute a valid defense to compliance under Article 5. Article 5(3) provides that each signatory to the Convention "shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized."³⁰ To that end, the Convention explicitly states that "[a] party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy."³¹

Additionally, Article 5(2) requires each party's competent authorities to enact legislation "to identify, trace, and freeze or seize proceeds, property, instrumentalities or any other [property] . . . for the purpose of eventual confiscation."³² Pursuant to Article 5(2), each party is obliged to enact domestic laws to restrain or freeze forfeitable assets prior to the entry of a domestic judgment of forfeiture.³³ Article 5(4)(b) requires that a party restrain or freeze assets for the benefit of the requesting party.³⁴ In addition, Article 5(4)(b) provides that following a request by another party having jurisdiction over an offense established in accordance with the Convention, "the requested party shall take measures to identify, trace, and freeze or seize proceeds, property, instrumentalities . . . for the purpose of eventual confiscation to be ordered either by the requesting party or . . . by the requested party."³⁵

Netherlands, Norway, Portugal, Spain, Sweden, and the United Kingdom. The European Laundering Convention represents an important effort towards international cooperation in combatting drug trafficking and money laundering. The United States is examining whether to sign the Convention.

30. U.N. Drug Convention, *supra* note 6, art. 5(3), 28 I.L.M. at 505.

31. *Id.* One commentator has noted that this provision, and a related undertaking in Article 7 of the Convention not to invoke bank secrecy in the context of a request for mutual legal assistance, are among the most important provisions in terms of the prosecution of international drug trafficking and money laundering offenses. See Stewart, *supra* note 20, at 387, 391.

32. U.N. Drug Convention, *supra* note 6, art. 5(2), 28 I.L.M. at 504. The European Laundering Convention contains a similar provision. Article 11 of this convention provides:

At the request of another party which has instituted criminal proceedings or proceedings for the purpose of confiscation, a party shall take the necessary provisional measures, such as freezing or seizing, to prevent any dealing in, transfer or disposal of property which, at a later stage, may be the subject of a request for confiscation or which might be such as to satisfy the request.

European Laundering Convention, *supra* note 29, art. 11, 30 I.L.M. at 153-54.

33. U.N. Drug Convention, *supra* note 6, art. 5(2), 28 I.L.M. at 504.

34. *Id.* art. 5(4)(b), 28 I.L.M. at 505.

35. *Id.*

Finally, if forfeitable property is located in the territory of a party, the requested party shall, upon request by another party, take either of two courses of action. First, pursuant to Article 5(4)(a)(i), if forfeitable property is located in its territory, the requested party shall, upon request, obtain an order of confiscation.³⁶ If such an order is granted, the requested party shall give it effect.³⁷ Alternatively, under Article 5(4)(a)(ii), upon request, the requested party shall enforce other countries' order of forfeiture entered with respect to property situated in its territory.³⁸ Article 5(4)(a)(ii) obliges a party to "[s]ubmit to [the countries] competent authorities, with a view to giving effect to . . . an order of confiscation issued by the requesting party . . . , in so far as it relates to proceeds, property, [or] instrumentalities . . . situated in the territory of the requested party."³⁹

The Convention further requires that each party afford one another "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings" in relation to criminal offenses established in accordance with the Convention.⁴⁰ This duty extends to enforcement of counter-narcotics, money laundering, and asset forfeiture laws. In the context of asset forfeiture proceedings, the Convention establishes procedures by which one party may request assistance from another country to seize or to restrain forfeitable property located in its territory pending a judgment of forfeiture. This procedure is intended to prevent the property from being removed from the territory to avoid confiscation.⁴¹ Additionally, upon request, the

36. *Id.* art. 5(4)(a)(i), 28 I.L.M. at 505.

37. *Id.*

38. *Id.* art. 5(4)(a)(ii), 28 I.L.M. at 505.

39. *Id.*

40. *Id.* art. 7(1), 28 I.L.M. at 508. The importance of international cooperation in combating illicit drug trafficking is recognized by the Single Convention. Single Convention, *supra* note 10, art. 35, 18 U.S.T. at 1425, 520 U.N.T.S. at 250. Article 35(c) requires parties to: cooperate closely with each other and with the competent international organizations of which they are members with a view to maintaining a coordinated campaign against the illicit traffic. *Id.* art. 35(c), 18 U.S.T. at 1425, 520 U.N.T.S. at 250. Article 35(d) further provides that parties "[e]nsure that international cooperation between the appropriate agencies be conducted in an expeditious manner." *Id.* art. 35(d), 18 U.S.T. at 1425, 520 U.N.T.S. at 250; *see* Geneva Protocol, *supra* note 10, art. 13(d)-(e), 26 U.S.T. at 1450, 976 U.N.T.S. at 11 (mandating international cooperation against drug trafficking).

41. U.N. Drug Convention, *supra* note 6, art. 5(4)(a)(i), (ii), 28 I.L.M. at 505. It should be noted that U.S. law currently permits the forfeiture of property located in the United States "constituting, derived from, or traceable to, any proceeds obtained di-

requested party is obliged to enforce another country's judgment of forfeiture.⁴²

II. FOREIGN COUNTRY COMPLIANCE WITH THE 1988 U.N. DRUG CONVENTION

A. Anti-Money Laundering Legislation

At the signing ceremony held on December 20, 1988, the representatives of forty-three nations signed the U.N. Drug Convention.⁴³ The number has since grown to more than 150 signatory countries.⁴⁴ Over the last ten years, however, the record of compliance with Article 3(1)(b), which imposes a duty to enact domestic anti-money laundering legislation,⁴⁵ has been sporadic and inconsistent. Today, several parties to the Convention have yet to enact laws criminalizing money laundering. Additionally, in many cases, parties have failed to enforce anti-money laundering laws aggressively. The members of the Financial Action Task Force on Money Laundering⁴⁶ ("FAFT") have realized significant compliance. Every member of FAFT has enacted domestic laws criminalizing money laundering. Many of these members, however, have only recently enacted anti-money laundering laws

rectly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance" if such offense would have been punishable by imprisonment for one year or more if it had occurred in the United States. 18 U.S.C. § 981(a)(1)(B) (1994); see European Laundering Convention, *supra* note 29, art. 13, 30 I.L.M. at 152.

42. U.N. Drug Convention, *supra* note 6, art. 5(4)(a)(ii), 28 I.L.M. at 505.

43. See *supra* note 18 and accompanying text.

44. See *supra* note 19 and accompanying text.

45. U.N. Drug Convention, *supra* note 6, art. 3(1)(b), 28 I.L.M. at 501.

46. See Evaluation of Laws and Systems in Financial Action Task Force on Money Laundering Members Dealing with Asset Confiscation and Provisional Measures ("FATF Evaluation"). Financial Action Task Force ("FATF") was initiated by the seven leading industrialized democracies, known as the G-7 countries. On June 20, 1988, at a meeting in Toronto, Canada, the G-7 countries pledged to establish a task force on international narcotics trade as part of a broader effort to stop the production, trafficking, and financing of illicit drugs. On April 23, 1990, FATF released a report issuing recommendations on combatting money laundering, including a recommendation to enact domestic anti-money laundering laws. See Bruce Zagaris & Elizabeth Kingma, *Asset Forfeiture International and Foreign Law: An Emerging Regime*, 5 EMORY INT'L L. REV. 445, 460 (1991). Other nations joined the G-7 countries in this effort. FAFT members include: Australia, Austria, Belgium, Canada, Denmark, Finland, France, Germany, Greece, Hong Kong, Iceland, Ireland, Italy, Japan, Luxembourg, the Netherlands, New Zealand, Norway, Portugal, Singapore, Spain, Sweden, Switzerland, Turkey, the United Kingdom, and the United States. Nineteen members of FAFT have ratified the 1988 U.N. Drug Convention. *Id.*

or made significant amendments to strengthen previously weak money laundering statutes. Thus, even as to these members there have been relatively few successful money laundering prosecutions and convictions.

Several major drug-producing or major drug-transit countries have failed to enact anti-money laundering legislation. These countries include: Afghanistan, Algeria, Cuba, El Salvador, Guatemala, Haiti, India, Iran, Pakistan, and Uruguay.⁴⁷ Several of these countries are original signatories to the Convention.⁴⁸ Other signatory nations have not aggressively enforced provisions of their recently-passed anti-money laundering laws.⁴⁹ Nations with a poor record of enforcing their domestic money laundering laws include: Colombia, Costa Rica, the Dominican Republic, Jamaica, Mexico, Nigeria, and Paraguay.⁵⁰ The record of non-compliance, by several of the major drug-producing and major drug-transit countries, is particularly disturbing and seriously calls into question the efficacy of the Convention.

In February 1998, the Clinton Administration determined that Afghanistan and Iran—both original signatories to the Con-

47. See INCS REPORT, *supra* note 1.

48. Afghanistan, Bolivia, Guatemala, and Iran signed the 1988 U.N. Drug Convention at the signing ceremony on December 20, 1988. *U.N. Web Page*, *supra* note 18.

49. For example, Brazil is recognized as a major money laundering country for illicit drug proceeds. See Paulina L. Jerez, *Proposed Brazilian Money Laundering Legislation: Analysis and Recommendations*, 12 AM. U. J. INT'L L. & POL'Y 329, 337, 352 (1997) (explaining that Brazil is excellent money laundering location because of strong currency, stable economy, geographic location, weak anti-money laundering laws, and lack of coordination between government agencies). In March 1998, Brazil enacted anti-money laundering legislation for the first time. See *President Cardoso promulgates anti-money-laundering law*, BBC Summary of World Broadcasts, Mar. 7, 1998 (discussing Brazil's Law on Crimes on Occultation of Assets and Values (money laundering)).

50. Colombia enacted money laundering legislation in 1995, but has not successfully prosecuted any cases under these provisions; Paraguay promulgated money laundering legislation in 1996, but the laws have not been enforced. See INCS Report, *supra* note 1, at 17. Several other countries that signed and ratified the 1988 U.N. Drug Convention have also failed to enforce aggressively their domestic money laundering statutes. These countries include: Costa Rica, the Dominican Republic, Jamaica, Mexico, and Nigeria. *Id.* at 56, 61, 76, 85, 91.

Mexico continues to be the money laundering haven of choice for laundering U.S. drug proceeds. During 1996 and 1997, Mexico strengthened its anti-money laundering laws by making money laundering a felony punishable by longer jail sentences. The first and only prosecution under this new legislation, however, was dismissed last year. *Id.* at 85. On December 15, 1997, the Honduran Congress passed legislation criminalizing money laundering for the first time in Honduras. To date, there are no reported prosecutions under the Honduran money laundering statute. *Id.* at 69.

vention—as well as Nigeria⁵¹ had not met the standards set forth in 22 U.S.C. § 2291h of the Foreign Assistance Act⁵² (the “Act”), and were not in full compliance with the goals and objectives of the 1988 U.N. Drug Convention.⁵³ Other signatories to the Convention, including Colombia, Pakistan, and Paraguay, were also

51. Nigeria was not one of the original signatories to the Convention. Nigeria signed the Convention on March 1, 1989, ratifying it on November 14, 1989. *U.N. Web Page*, *supra* note 18.

52. Foreign Assistance Act, 22 U.S.C. § 2291h (1994).

53. See Presidential Determination No. 98-15, Memorandum for the Secretary of State, signed by President William J. Clinton (Feb. 26, 1998). The law requires the President to determine whether countries have cooperated fully with the United States or taken adequate steps to meet the counter-narcotics goals and objectives of the 1988 U.N. Drug Convention. The denial of certification involves foreign assistance sanctions, as well as a mandatory U.S. vote against multilateral development bank loans. 22 U.S.C. § 2291h provides in relevant part:

(a) Withholding of bilateral assistance and opposition to multilateral development assistance—

(1) Bilateral assistance—Fifty percent of the United States assistance allocated each fiscal year in the report required by section 2413 of this title for each major illicit drug producing country or major drug-transit country shall be withheld from obligation and expenditure, except as provided in subsection (b) . . .

(2) Multilateral assistance—The Secretary of the Treasury shall instruct the United States Executive Director of each multilateral development bank to vote, on and after March 1 of each year, against any loan or other utilization of the funds of their respective institution to or for any major illicit drug producing country or major drug-transit country . . . , except as provided in subsection (b) of this section . . .

(b) Certification procedures—

(1) What must be certified—Subject to subsection (d) of this section, the assistance withheld from a country pursuant to subsection (a)(1) of this section may be obligated and expended, and the requirement of subsection (a)(2) of this section to vote against multilateral development bank assistance to a country shall not apply, if the President determines and certifies to the Congress, at the time of the submission of the report required by Section 2291h(a) of this title, that—

(A) during the previous year the country has cooperated fully with the United States, or has taken adequate steps on its own, to achieve full compliance with the goals and objectives established by the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances; or

(B) for a country that would not otherwise qualify for certification under subparagraph (A), the vital national interests of the United States require that the assistance withheld pursuant to subsection (a)(1) of this section be provided and that the United States not vote against multilateral development bank assistance for that country pursuant to subsection (a)(2) of this section.

. . .

(e) Denial of assistance for countries decertified—

If the President does not make a certification under subsection (b) of this section with respect to a country or the Congress enacts a joint resolution

found in non-compliance, but were admitted nonetheless, pursuant to section 2291j(b)(1)(B) of the Act, after a determination that certification was in the "vital national interests" of the United States.⁵⁴ Thus, in retrospect, while some progress has been realized, it appears that several of the most egregious drug-trafficking and drug-transit nations have consistently failed to comply with the duties imposed under the 1988 U.N. Drug Convention.

B. *Mutual Legal Assistance Treaties on Asset Forfeiture*

The United States is party to several mutual legal assistance treaties ("MLAT").⁵⁵ Generally, MLATs allow the parties to ob-

disapproving such certification, then until such time as the conditions specified in subsection (f) of this section are satisfied—

(1) funds may not be obligated for United States assistance for that country, and funds previously obligated for United States assistance for that country may not be expended for the purpose of providing assistance for that country; and

(2) the requirement to vote against multilateral development bank assistance pursuant to subsection (a)(2) of this section shall apply with respect to that country, without regard to the date specified in that subsection.

22 U.S.C. § 2291j.

54. Presidential Determination No. 98-15, Memorandum for the Secretary of State, signed by President William J. Clinton (Feb. 26, 1998). Colombia and Paraguay were original signatories to the Convention. *See U.N. Web Page, supra* note 18. Pakistan signed the Convention on December 20, 1989, ratifying it on October 25, 1991. *See id.*

55. *See* Alan Ellis & Robert L. Pisani, *The United States Treaties on Mutual Assistance in Criminal Matters*, 2 *INTERNATIONAL CRIMINAL LAW PROCEDURE* 151-79 (M. Bassiouni ed., 1986) (discussing United States' mutual legal assistance treaties ("MLATs")).

The United States currently has operative MLATs with the following countries: Argentina, Treaty with Argentina on Mutual Legal Assistance in Criminal Matters, with Attachments, Dec. 4, 1990, U.S.-Arg., S. TREATY DOC. NO. 102-18 (1993) (entered into force Feb. 9, 1993) [hereinafter MLAT U.S.-Argentina]; the Bahamas, Bilateral Agreement Between the Government of the United States of America and the Commonwealth of the Bahamas on the Control of Narcotic Drugs and Psychotropic Substances, Feb. 17, 1989, U.S.-Bah., T.I.A.S. No. 11602 (entered into force Feb. 17, 1989) [hereinafter MLAT U.S.-Bahamas]; Brazil, Mutual Cooperation Agreement Between the Governments of the United States of America and the Federative Republic of Brazil for Reducing Demand, Preventing Illicit Use, and Combating Illicit Production and Traffic of Drugs, Sept. 3, 1986, U.S.-Braz., 1991 WL 494968 (entered into force June 13, 1991) [hereinafter MLAT U.S.-Brazil]; Canada, Treaty Between the United States and Canada on Mutual Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., 1990 Can. T.S. 19 (entered into force Jan. 24, 1990) [hereinafter MLAT U.S.-Canada]; Colombia, Mutual Cooperation Agreement Between the Government of the United States of America and the Government of the Republic of Colombia to Combat, Prevent, and Control Money Laundering Arising from Illicit Activities, Feb. 27, 1992, U.S.-Colom., 1992 WL 465994 (entered into force Feb. 27, 1992) [hereinafter MLAT U.S.-Colombia]; Hungary, Treaty with Hungary on Mutual Legal Assistance in Criminal Matters, Dec. 1,

1994, U.S.-Hung., S. TREATY DOC. NO. 104-20 (entered into force Mar. 18, 1997) [hereinafter MLAT U.S.-Hungary]; Israel, Agreement Between The Government of the United States of America and the Government of the State of Israel Regarding Mutual Assistance in Customs Matters, May 16, 1996, U.S.-Isr., 1997 WL 734974 (entered into force Sept. 24, 1997) [hereinafter MLAT U.S.-Israel]; Italy, Treaty with Italy on Mutual Assistance in Criminal Matters, with Memorandum of Understanding, Nov. 9, 1982, U.S.-Italy, 88 DEP'T ST. BULL., Feb. 1988, at 91 (entered into force Nov. 13, 1985) [hereinafter MLAT U.S.-Italy]; Mexico, Treaty on Cooperation Between the United States and Mexico for Mutual Legal Assistance, Dec. 19, 1987, U.S.-Mex., S. TREATY DOC. NO. 100-13 (1987) [hereinafter MLAT U.S.-Mexico]; Morocco, Agreement Between the Government of the Kingdom of Morocco and the Government of the United States of America Regarding Joint Cooperation in Fighting against International Terrorism, Organized Crime, and the Illicit Production, Trafficking, and Abuse of Narcotics, Feb. 10, 1989, 1989 WL 428827 (entered into force Feb. 10, 1989) [hereinafter MLAT U.S.-Morocco]; the Netherlands, Agreement Between the Government of the United States and the Government of the Kingdom of the Netherlands Regarding Mutual Cooperation in the Tracing, Freezing, Seizure and Forfeiture of Proceeds and Instrumentalities of Crime and the Sharing of Forfeited Assets, Nov. 20, 1992, U.S.-Neth., 1994 WL 524966 (entered into force Aug. 4, 1994) [hereinafter MLAT U.S.-Netherlands]; Panama, Treaty with Panama on Mutual Assistance in Criminal Matters, Apr. 11, 1991, U.S.-Pan., S. TREATY DOC. NO. 102-15 (1991) [hereinafter MLAT U.S.-Panama]; the Philippines, Treaty with the Philippines on Mutual Legal Assistance in Criminal Matters, Nov. 13, 1994, U.S.-Phil., S. TREATY DOC. NO. 104-18 (1994) (entered into force Nov. 23, 1996) [hereinafter MLAT U.S.-Philippines]; St. Kitts and Nevis, Agreement Between the Government of the United States and the Government of St. Kitts and Nevis Concerning Maritime Counter-Drug Operations, Apr. 13, 1995, U.S.-St. Kitts & Nevis, 1995 WL 337143 (entered into force Apr. 13, 1995), *as amended by* Agreement between the United States and St. Kitts and Nevis Amending the Agreement of April 13, 1995 Concerning Maritime Counter-Drug Operations, 1996 WL 482067 (entered into force June 27, 1996) [hereinafter MLAT U.S.-St. Kitts]; South Korea, Treaty with the Republic of Korea on Mutual Legal Assistance in Criminal Matters, May 23, 1997, U.S.-Kor., 1993 WL 796842 (entered into force May 23, 1997) [hereinafter MLAT U.S.-Korea]; Spain, Treaty on Mutual Legal Assistance in Criminal Matters, with attachments, Nov. 20, 1990, U.S.-Spain, 90 DEP'T ST. BULL., Dec. 1990, at 91 [hereinafter MLAT U.S.-Spain]; Switzerland, Agreement Between the United States and Switzerland Relating to the Treaty of May 25, 1973, on Mutual Assistance in Criminal Matters, Nov. 3, 1993, U.S.-Switz., 1993 WL 544335 (entered into force Jan. 23, 1997) [hereinafter MLAT U.S.-Switzerland]; Thailand, Treaty Between the Government of Thailand and the Government of the United States of America Concerning Mutual Assistance in Criminal Matters, with attachments, Mar. 19, 1986, U.S.-Thail., S. TREATY DOC. NO. 101-18 (1986) [hereinafter MLAT U.S.-Thailand]; Turkey, Extradition and Mutual Assistance in Criminal Matters, June 7, 1979, U.S.-Turk., 32 U.S.T. 3111 (entered into force Jan. 1, 1981) [hereinafter MLAT U.S.-Turkey]; the United Kingdom for Anguilla, the British Virgin Islands, the Cayman Islands, Montserrat, and Turks and Caicos Islands, United Kingdom-United States: Treaty Concerning the Cayman Islands and Mutual Legal Assistance in Criminal Matters, July 3, 1986, U.S.-U.K., 26 I.L.M. 536 (1987) (entered into force July 3, 1986) [hereinafter MLAT-Cayman]; United Kingdom, Treaty Between the United States of America and the United Kingdom of Great Britain and Northern Ireland on Mutual Legal Assistance in Criminal Matters, Dec. 2, 1996, S. TREATY DOC. NO. 104-2 (1996) [hereinafter MLAT U.S.-U.K.]; Uruguay, Treaty with Uruguay on Mutual Legal Assistance in Criminal Matters, May 6, 1991, U.S.-Uru., S. TREATY DOC. NO. 102-19 (1994) (entered into force Apr. 15, 1994) [hereinafter MLAT U.S.-Uruguay]; and Vene-

tain documentary evidence and other forms of legal assistance to aid law enforcement authorities in investigating and prosecuting criminal matters. These treaties establish direct channels of communication, generally Justice-to-Justice, intended to expedite and to facilitate all categories of assistance. MLATs provide for a broad range of cooperation in criminal matters, including: (1) taking testimony or statements of witnesses; (2) providing documents, records, and evidence; (3) serving legal documents; (4) locating or identifying persons; (5) executing requests for

zuela, Agreement Between the Government of the United States of America and the Government of the Republic of Venezuela Regarding Cooperation in the Prevention and Control of Money Laundering Arising From Illicit Trafficking in Narcotic Drugs and Psychotropic Substances, Nov. 5, 1990, U.S.-Venez., 1991 WL 494879 (entered into force Jan. 1, 1991) [hereinafter MLAT U.S.-Venezuela].

In addition, MLATs have been signed but not yet brought into force with an additional 15 governments: Antigua and Barbuda, Mutual Legal Assistance in Criminal Matters with Antigua and Barbuda, Dominica, Grenada and St. Lucia, Apr. 19, 1995, 1995 WL 370397 [hereinafter Multi-MLAT]; Australia, Treaty Between the United States and Australia on Mutual Legal Assistance in Criminal Matters, Apr. 30, 1997, U.S.-Austl., S. TREATY DOC. NO. 105-27 (1997) [hereinafter MLAT U.S.-Australia]; Austria, Treaty with Austria on Mutual Legal Assistance in Criminal Matters, Feb. 23, 1995, U.S.-Aus., S. TREATY DOC. NO. 104-21 (1995) [hereinafter MLAT U.S.-Austria]; Barbados, Treaty Between the United States and Barbados on Mutual Legal Assistance in Criminal Matters, Feb. 28, 1996, U.S.-Barb., S. TREATY DOC. NO. 105-20 (1996) [hereinafter MLAT U.S.-Barbados]; Belgium, Treaty with Belgium on Mutual Assistance in Criminal Matters, with related notes, June 12 & Aug. 18, 1987, U.S.-Belg., S. TREATY DOC. NO. 100-17 (1987) [hereinafter MLAT U.S.-Belgium]; the Czech Republic, Treaty with Czech Republic on Mutual Legal Assistance in Criminal Matters, Feb. 4, 1998, U.S.-Czech Rep., S. TREATY DOC. NO. 105-47 (1998) [hereinafter MLAT U.S.-Czech]; Dominica, Multi-MLAT, *supra*; Grenada, Multi-MLAT, *supra*; Hong Kong, Agreement with Hong Kong on Mutual Legal Assistance in Criminal Matters, Apr. 15, 1997, U.S.-H.K., S. TREATY DOC. NO. 105-6 (1997) [hereinafter MLAT U.S.-Hong Kong]; Latvia, Treaty Between the United States and the Republic of Latvia on Mutual Assistance in Criminal Matters, June 13, 1997, U.S.-Lat., 37 I.L.M. 749 (1998) [hereinafter MLAT U.S.-Latvia]; Lithuania, Lithuania-United States: Treaty on Mutual Legal Assistance in Criminal Matters, Jan. 16, 1998, U.S.-Lith., 37 I.L.M. 749 [hereinafter MLAT U.S.-Lithuania]; Luxembourg, Treaty Between the United States and Luxembourg on Mutual Legal Assistance in Criminal Matters, Mar. 13, 1997, U.S.-Lux., S. TREATY DOC. NO. 105-11 (1997) [hereinafter MLAT U.S.-Luxembourg]; Nigeria, Mutual Cooperation Agreement for Reducing Demand, Preventing Illicit Use, and Combating Illicit Production and Trafficking in Drugs, Jan. 13, 1989, U.S.-Nig. 1989 WL 428859 [hereinafter MLAT U.S.-Nigeria]; Poland, Treaty Between the United States and Poland on Mutual Legal Assistance in Criminal Matters, July 10, 1996, U.S.-Pol., S. TREATY DOC. NO. 105-13 (1997) [hereinafter MLAT U.S.-Poland]; St. Lucia, Multi-MLAT, *supra*; and Trinidad and Tobago, Treaty Between the United States and the Republic of Trinidad and Tobago on Mutual Legal Assistance in Criminal Matters, Mar. 4, 1996, U.S.-Trin. & Tobago, S. TREATY DOC. NO. 105-22 (1997) [hereinafter MLAT U.S.-Trinidad]. The United States has also signed the Inter-American Convention on Mutual Assistance in Criminal Matters, Jan. 10, 1995, S. TREATY DOC. NO. 104-35 (1995) [hereinafter Inter-American MLAT].

searches and seizures; and (6) providing assistance in proceedings related to the forfeiture of the proceeds and instrumentalities of crime.⁵⁶

The majority of recent MLATs explicitly address forfeiture issues, setting forth procedures by which one country may request another country to identify, to trace, to freeze, or to seize proceeds and instrumentalities of drug trafficking activity.⁵⁷ "The parties are required to assist each other, to the extent permitted by their respective laws, in procedures relating to the immobilizing, securing, and forfeiting of the proceeds, fruits, and instrumentalities of crime"⁵⁸ For example, the MLAT between Mexico and the United States specifically provides that, to the extent permitted by their respective laws and procedures, a requested country will assist in immobilizing, securing, and forfeiting the proceeds, fruits, and instrumentalities of crime.⁵⁹ The MLAT between the United States and the United Kingdom is similar in this respect, providing that "[t]he parties shall assist each other in proceedings involving the identification, tracing, freezing, seizure or forfeiture of the proceeds and instrumentalities of crime."⁶⁰

Article 5(4)(g) of the 1988 U.N. Drug Convention provides that each signatory shall conclude bilateral and multilateral treaties.⁶¹ The purpose of these bilateral and multilateral treaties is to enhance the effectiveness of international cooperation as it relates to the forfeiture of drug proceeds and instrumentalities of drug trafficking.⁶² Mutual legal assistance in relation to confiscation is divisible into three broad categories: (a) investigative assistance to identify and to trace property and to obtain documents; (b) provisional measures to freeze or to seize property

56. See, e.g., MLAT U.S.-Canada, *supra* note 55, art. 2, 1990 Can. T.S. at 19.

57. See Snider, *supra* note 9, at 382-83.

58. See Zagaris & Kingma, *supra* note 46, at 478.

59. MLAT U.S.-Mexico, *supra* note 55, art. 11.

60. MLAT U.S.-U.K., *supra* note 55, art. 16.

61. U.N. Drug Convention, *supra* note 6, art. 5(4)(g), 28 I.L.M. at 505. Article 5(4)(g) states: "The parties shall seek to conclude bilateral and multilateral treaties, agreements or arrangements to enhance the effectiveness of international cooperation pursuant to this Article." *Id.*

62. *Id.* The duty of international cooperation is reinforced by Article 7(1), which requires parties to afford one another "the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to criminal offenses" established under the U.N. Drug Convention. *Id.* art. 7(1), 28 I.L.M. at 508.

located in the territory of the requested party; and (c) enforcement of another country's confiscation orders.

The 1988 U.N. Drug Convention requires all three types of legal assistance. First, Article 5(4)(b) requires mutual legal assistance in the investigative stage of the forfeiture proceedings.⁶³ This provision provides that following a request by another party, the requested party shall take measures to identify and to trace forfeitable property. Thus, pursuant to Article 5(4)(b), the requested party would be obliged to make available bank, financial, or commercial records located in its territory that would be needed to identify and to trace property subject to forfeiture in the requesting state.⁶⁴

Second, Article 5(4)(b) requires each party to take provisional measures to "freeze or seize proceeds, property, [or] instrumentalities [of drug trafficking] . . . for the purpose of eventual confiscation."⁶⁵ Thus, following a request, the requested party is obliged to provide legal assistance to the requesting party by seizing or freezing property located in its territory that is the subject of a forfeiture action in the requesting state. Finally, Article 5(4)(a)(ii) imposes a duty on the parties to enforce a forfeiture order from another country.⁶⁶ This provision requires a party to provide assistance, upon request, by submitting a foreign forfeiture order to its competent authorities for the purpose of enforcement.⁶⁷

63. *Id.* art. 5(4)(b), 28 I.L.M. at 505.

64. *Id.* This obligation finds further support in Article 5(3), which provides: In order to carry out the measures referred to in this article, each party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or be seized. A party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

Id. art. 5(3), 28 I.L.M. at 505.

65. *Id.* art. 5(4)(b), 28 I.L.M. at 505.

66. *Id.* art. 5(4)(a)(ii), 28 I.L.M. at 503.

67. Article 5(4)(a)(ii) provides in relevant part:

Following a request made pursuant to this article by another party having jurisdiction over an offence established in accordance with article 3, paragraph 1, the party in whose territory proceeds, property, instrumentalities . . . shall:

. . .

(ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting party . . . , in so far as it relates to proceeds, property, instrumentalities . . . situated in the territory of the requested party.

Id.

Unfortunately, several recently-entered MLATs apparently intended to implement the 1988 U.N. Drug Convention, fall far short of complying with the legal obligations of mutual assistance imposed under the Convention. The MLAT provisions are formulated in loose terms with easy escape clauses. Often, these provisions constitute nothing more than suggestions and recommendations, rather than imposing firm duties and obligations. Perhaps the most glaring deficiency is that the language used is discretionary ("may") rather than mandatory ("shall"), thereby imposing no duty or obligation to assist whatsoever. Furthermore, these MLATs often fail to require each party to assist in freezing or restraining forfeitable assets so that they are not removed from the territory pending an order of forfeiture. Equally disturbing, these MLATs are often silent, failing to require mutual assistance in enforcing foreign judicial forfeiture orders.

For example, the MLAT between the United States and Barbados⁶⁸ ("U.S.-Barbados MLAT") is discretionary rather than mandatory, regarding the obligation of the requested party to seize and to freeze assets located within its territory. The MLAT provides that "[i]f the Central Authority of one Contracting party becomes aware of proceeds or instrumentalities of offenses which are located in the territory of the other party and may be forfeitable or otherwise subject to seizure under the laws of that party, it *may* so inform the Central Authority of the other party."⁶⁹ The use of the word "may" rather than "shall" makes this choice to inform the Central Authority discretionary with the party. Apparently, if the party decides for whatever reason not to inform the other contracting party, there is no obligation to do so under the MLAT.

In addition, the U.S.-Barbados MLAT provides that the contracting parties shall assist each other "to the extent permitted by their respective laws in proceedings relating to the forfeiture of the proceeds and instrumentalities of offenses."⁷⁰ The U.S.-Bar-

68. MLAT U.S.-Barbados, *supra* note 55, art. 16(1).

69. *Id.* (emphasis added). Similar provisions are found in other MLATs. See MLAT U.S.-Austria, *supra* note 55; MLAT U.S.-Hungary, *supra* note 55; MLAT U.S.-Korea, *supra* note 55; MLAT U.S.-Luxembourg, *supra* note 55; MLAT U.S.-Panama, *supra* note 55. The MLATs between the United States and Austria, Barbados, Hungary, and Luxembourg have been signed but await Senate confirmation.

70. U.N. Drug Convention, *supra* note 6, art. 16(2), 28 I.L.M. at 518.

bados MLAT, however, provides that this assistance may include action to immobilize the proceeds or instrumentalities temporarily, pending further proceedings.⁷¹ Thus, there is no obligation under the U.S.-Barbados MLAT to restrain forfeitable assets in order to prevent them from being removed from the territory. This provision is wholly discretionary among the parties. Therefore, it is of little relative value when requiring assistance from other countries in forfeiture proceedings. Cooperation under the MLAT, pertaining to freezing assets located in another country's territory, is wholly illusory.

A substantially similar provision providing for the freezing of assets within the discretion of the requested party is found in the MLATs between the United States and Hungary,⁷² the Republic of Korea,⁷³ Luxembourg,⁷⁴ the Philippines,⁷⁵ Poland,⁷⁶ Russia,⁷⁷ and Trinidad and Tobago.⁷⁸

The MLAT between the United States and Australia is deficient on other grounds. Article 17 of this treaty requires assistance "to locate, trace, restrain, freeze, seize, forfeit, or confiscate the proceeds and instrumentalities of crime," but fails to include a provision imposing any obligation on the parties to enforce foreign forfeiture orders as required by Article 5(4)(b) of the U.N. Drug Convention.⁷⁹ The MLAT between the United States and Luxembourg ("U.S.-Luxembourg MLAT") makes the matter discretionary among the parties. The U.S.-Luxembourg MLAT provides that contracting parties may assist each other to give effect to final decisions rendered in either state that require forfeiting proceeds, objects, or instrumentalities of an offense.⁸⁰

The Inter-American Convention on Mutual Assistance in

71. *Id.*

72. See MLAT U.S.-Hungary, *supra* note 55, art. 17(2).

73. See MLAT U.S.-Korea, *supra* note 55, art. 17(2), 1993 WL 796842, at *4.

74. See MLAT U.S.-Luxembourg, *supra* note 55, art. 17(1).

75. See MLAT U.S.-Philippines, *supra* note 55, art. 16(2).

76. See MLAT U.S.-Poland, *supra* note 55.

77. See Treaty Between the United States and Russia on Cooperation in Criminal Law Matters, June 30, 1995, U.S.-Russ., art. 15(2), 1995 WL 831037 (entered into force Feb. 5, 1996).

78. See MLAT U.S.-Trinidad, *supra* note 55, art. 16(2).

79. See MLAT U.S.-Australia, *supra* note 55. The following MLATs are silent on the obligation of the parties to enforce a foreign judgment of forfeiture: the MLAT between the United States and Austria, Barbados, Canada, Hungary, the Republic of Korea, Panama, the Philippines, Poland, and Russia.

80. See MLAT U.S.-Luxembourg, *supra* note 55, art. 17(3).

Criminal Matters⁸¹ is vaguely worded and non-specific regarding the obligations of assistance imposed thereunder. Article 15 of this convention provides that "[t]he parties shall assist each other, to the extent permitted by their respective laws, in precautionary measures and measures for securing the proceeds, fruits, and instrumentalities of the crime."⁸² The Inter-American MLAT does not explicitly require a party to submit to its competent authorities a foreign judgment of forfeiture for the purpose of giving it effect in the requested state. Furthermore, neither of the parties involved is required to enact domestic legislation for that purpose.

While the 1988 U.N. Drug Convention requires parties to assist one another in forfeiting drug proceeds and instrumentalities of narcotics trafficking, the MLAT between the United States and Canada is limited to providing assistance to forfeit criminal proceeds. Article XVII of this MLAT provides that:

1. The Central Authority of either party shall notify the Central Authority of the other party of proceeds of crime believed to be located in the territory of the other party[; and]
2. The parties shall assist each other to the extent permitted by their respective laws in proceedings related to the forfeiture of the proceeds of crime, restitution to the victims of crime, and the collection of fines imposed as a sentence in a criminal prosecution.⁸³

This MLAT is silent on the duty to provide legal assistance to forfeit instrumentalities of crime. Furthermore, no obligation to enforce foreign orders of forfeiture is specified in this MLAT.

The MLAT between the United States and Hong Kong ("U.S.-Hong-Kong MLAT") is one of the few MLATs that conforms with the requirements imposed under the 1988 U.N. Drug Convention.⁸⁴ Article 18(1) of the U.S.-Hong-Kong MLAT requires the parties to assist in the investigative stages of a forfeiture action.⁸⁵ Article 18(1) states that a requested party "shall," upon request, endeavor to ascertain whether any proceeds or in-

81. Inter-American MLAT, *supra* note 55.

82. *Id.* Other MLATs contain similarly worded provision. See MLAT U.S.-Austria, *supra* note 55, art. 16; MLAT U.S.-Canada, *supra* note 55, art. 17(2), 1990 Can. T.S. at 24; MLAT U.S.-Panama, *supra* note 55, art. 14(2).

83. MLAT U.S.-Canada, *supra* note 55, art. 17, 1990 Can. T.S. at 24.

84. U.N. Drug Convention, *supra* note 6.

85. MLAT U.S.-Hong-Kong, *supra* note 55, art. 18(1).

strumentalities of crime are located within its territory. If so, the requested party is obliged to inform the requesting party. Additionally, Article 18(2) requires a party to take provisional measures to freeze or to seize suspected proceeds or instrumentalities to prevent their disposal or transfer, pending a final determination by a court of the requested party.⁸⁶ Finally, Article 18(3) authorizes enforcement of a court forfeiture order in the requesting party.⁸⁷

The Agreement Between the United States and the Netherlands Regarding Mutual Cooperation in the Tracing, Freezing, Seizure, and Forfeiture of Proceeds and Instrumentalities of Crime, and the Sharing of Forfeited Assets⁸⁸ ("U.S.-Netherlands MLAT") is by far the most comprehensive and detailed in setting forth the obligations of the parties with respect to forfeiture.⁸⁹ It serves as a model mutual legal assistance agreement. Article 2 provides that the parties "shall" afford each other assistance in the identification and tracing of proceeds and instrumentalities of crime.⁹⁰ "Such assistance shall include any measure providing and securing evidence as to the existence, location, movement, nature, legal status or value of the . . . property."⁹¹ Article 2 requires the parties to institute provisional measures, such as freezing and seizure, with respect to forfeitable property.⁹² Article 3 of the U.S.-Netherlands MLAT requires enforcement of foreign forfeiture orders.⁹³ It states that:

To the extent permitted by the respective domestic laws, the parties shall, upon request, take all measures to enforce a forfeiture order of a court of the requesting party affecting proceeds and instrumentalities of crime, or property of equivalent value, located within the territorial jurisdiction of

86. *Id.* art. 18(2).

87. *Id.* art. 18(3). Article 18(3) provides:

Where a request is made for assistance in securing the confiscation or forfeiture of proceeds or instrumentalities of crime, such assistance shall be given by whatever means are appropriate. This may include enforcing an order made by a court in the Requesting party or initiating or assisting in proceedings in relation to the request.

Id.

88. See MLAT U.S.-Netherlands, *supra* note 55.

89. *Id.*

90. *Id.* art. 2, 1994 WL 524966, at 1.

91. *Id.* art. 1, 1994 WL 524966, at 1.

92. *Id.* art. 2, 1994 WL 524966, at 1.

93. *Id.* art. 3, 1994 WL 524966, at 2.

the requested party, or to initiate its own forfeiture proceedings against such property.⁹⁴

The U.S.-Netherlands MLAT implicates the three types of legal assistance imposed under the 1988 U.N. Drug Convention.

In summary, a review of MLATs on asset forfeiture reveals that a substantial majority of the signatories to the 1988 U.N. Drug Convention are not in compliance with the obligations imposed under the Convention to provide one another the widest measure of mutual legal assistance.

III. U.S. COMPLIANCE WITH THE 1988 U.N. DRUG CONVENTION

A. Domestic Money Laundering Legislation⁹⁵

The United States is in compliance with Article 3(1)(b) of the 1988 U.N. Drug Convention, which requires each party to enact domestic money laundering legislation.⁹⁶ Several questions remain, however, as to how aggressively federal prosecutors have enforced the enacted provisions. In 1986, Congress enacted a comprehensive anti-money laundering scheme. The Money Laundering Control Act⁹⁷ ("MLCA") makes laundering proceeds derived from specified unlawful activity a federal crime.⁹⁸ By enacting federal legislation criminalizing the laundering of illicit proceeds, Congress was responding to both the spiraling growth and pervasiveness of money laundering in the United States, and the nexus between money laundering and or-

94. *Id.* art. 3, 1994 WL 524966, at 2; see *United States v. Vacant Lot Known as Los Morros*, 885 F. Supp. 1329, 1331 (S.D. Cal. 1995) (holding that court had subject matter jurisdiction over forfeiture of property located in United States based on criminal acts committed in Netherlands). Jurisdiction was proper under three different treaties and agreements to which the United States and the Netherlands are parties: (1) Treaty on Mutual Legal Assistance in Criminal Matters Between the United States and the Kingdom of the Netherlands; (2) the Agreement Between the United States and the Kingdom of the Netherlands Regarding Mutual Cooperation in the Tracing, Freezing, Seizure and Forfeiture of Proceeds and Instrumentalities of Crime and the Sharing of Forfeited Assets; and (3) United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances. *Id.* at 1331.

95. The sections on domestic and international money laundering are derived partly from J. PAUST, M.C. BASSIOUNI, S. WILLIAMS, M. SCHARF, J. GURULÉ, & B. ZAGARIS, *INTERNATIONAL CRIMINAL LAW* 1334-1338 (1996).

96. U.N. Drug Convention, *supra* note 6, art. 3(1)(b), 28 I.L.M. at 500.

97. Money Laundering Control Act of 1986, 18 U.S.C. §§ 1956-57 (1994).

98. *Id.*

ganized crime.⁹⁹ The primary intent was to criminalize the “process by which one conceals the existence, illegal source, or illegal application of income, and then disguises that income to make it appear legitimate.”¹⁰⁰ The MLCA also aimed to stem the flow of illicit profits back to the criminal enterprise used to capitalize criminal profits and to expand criminal activity.¹⁰¹

The MLCA makes it a crime to engage knowingly in a financial transaction with the proceeds of some form of unlawful activity either “with the intent to promote the carrying on of specified unlawful activity,”¹⁰² or with the design of concealing the “nature, location, source, ownership, or control of the [illicit] proceeds.”¹⁰³ Sections 1956(a)(1)(A)(i), the “promotion” provision, and (a)(1)(B)(i), the “concealment” provision, are aimed at different activities: “the first at the practice of plowing back proceeds of ‘specified unlawful activity’ to promote that activity,

99. See HOUSE COMM. ON BANKING, HOUSING, AND URBAN AFFAIRS, 99TH CONG., 2D SESS. 16, COMPREHENSIVE MONEY LAUNDERING PREVENTION ACT, H.R. REP. NO. 99-746 (1986).

100. PRESIDENT’S COMM’N ON ORGANIZED CRIME, *THE CASH CONNECTION: ORGANIZED CRIME, FINANCIAL INSTITUTIONS, AND MONEY LAUNDERING* 7 (1984).

101. Sen. Alfonse D’Amato, a chief sponsor of the senate bill, posited: Money laundering permits the drug traffickers to evade taxes and to conduct their operations and finance their drug networks behind a veil of secrecy. It allows them to buy more drugs for resale, and to acquire the planes, boats, front corporations they use to smuggle drugs into the United States. *Drug Money Laundering, Hearing Before the Senate Comm. on Banking, Housing, and Urban Affairs*, 99th Cong., 1st Sess. 7 (1985).

102. Laundering of Monetary Instruments, 18 U.S.C. § 1956(a)(1)(A)(i), (ii) (1994). The Money Laundering Control Act (“MLCA”) provides in relevant part: (a)(1) Whoever, knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity, conducts or attempts to conduct such a financial transaction which in fact involves the proceeds of specified unlawful activity— (A)(i) with the intent to promote the carrying on of specified unlawful activity; or (ii) with intent to . . . [violate] section 7201 or 7206 of the Internal Revenue Code or 1986; . . . shall be sentenced to a fine . . . or imprisonment . . .

Id.

103. 18 U.S.C. § 1956(a)(1)(B)(i). The MCLA provides in relevant part who: (B) knowing that the transaction is designed in whole or in part (i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity; or (ii) to avoid a transaction reporting requirement under state or federal law shall be sentenced to a fine . . . or imprisonment . . .

Id.; see JIMMY GURULÉ, *COMPLEX CRIMINAL LITIGATION: PROSECUTING DRUG ENTERPRISES AND ORGANIZED CRIME* 105-139 (1996) & 1998 Comprehensive Supp. (discussing MLCA and statutory schemes).

the second at hiding the proceeds of the activity.”¹⁰⁴ Section 1956(c)(7) defines the term specified unlawful activity as encompassing a broad array of statutorily designated felony offenses.¹⁰⁵ As defined in the statute, “specified unlawful activity” includes bank fraud,¹⁰⁶ conducting an illegal gambling business and interstate transmission of wagering information,¹⁰⁷ mail fraud,¹⁰⁸ wire fraud,¹⁰⁹ a violation of the Hobbs Act,¹¹⁰ and narcotics trafficking.¹¹¹

B. *International Money Laundering*¹¹²

The MLCA prohibits international money laundering.¹¹³

104. *United States v. Jackson*, 935 F.2d 832, 842 (7th Cir. 1991); *see United States v. Miller*, 22 F.3d 1075, 1080 (11th Cir. 1994); *United States v. Samour*, 9 F.3d 531, 535 (6th Cir. 1993), *rev'd in part*, *United States v. Reed*, 77 F.3d 139 (6th Cir.), *cert. denied*, 517 U.S. 1246 (1996).

105. *See* 18 U.S.C. § 1956(c)(7)(A) (defining specified unlawful activity as any act that would constitute “racketeering activity” under RICO, 18 U.S.C. § 1961(1) (1994)). Section 1961(1), in turn, designates numerous felony offenses that would support a finding that the defendant engaged in a pattern of “racketeering activity.” 18 U.S.C. § 1961(1). Section 1956(c)(7)(d) details other federal felony offenses that constitute specified unlawful activity. 18 U.S.C. § 1956(c)(7)(d); *see United States v. Carr*, 25 F.3d 1194, 1206 (3d Cir. 1994).

106. *United States v. Savage*, 67 F.3d 1435, 1440 (9th Cir. 1995); *United States v. Piervinanzi*, 23 F.3d 670, 679 (2d Cir. 1994).

107. *United States v. Manarite*, 44 F.3d 1407, 1414 (9th Cir. 1995); *United States v. Miller*, 22 F.3d 1075, 1077 (11th Cir. 1994); *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994).

108. *United States v. Haun*, 90 F.3d 1096, 1099 (6th Cir.), *cert. denied*, 117 S. Ct. 691 (1996); *Savage*, 67 F.3d at 1440; *United States v. Smith*, 39 F.3d 119, 122 (6th Cir. 1994); *United States v. Cavalier*, 17 F.3d 90, 193 (5th Cir. 1994); *United States v. Paramo*, 998 F.2d 1212, 1216-18 (3d Cir. 1993), *cert. denied*, 510 U.S. 121 (1994).

109. *United States v. Habhab*, 132 F.3d 410, 414 (8th Cir. 1997); *United States v. Hare*, 49 F.3d 447, 451-52 (8th Cir. 1995).

110. *United States v. Montoya*, 945 F.2d 1068, 1076 (9th Cir. 1991).

111. *United States v. Carr*, 25 F.3d 1194, 1206 (3d Cir. 1994); *United States v. Jackson*, 935 F.2d 832, 841 (7th Cir. 1991).

112. This subsection was adapted in part from PAUST, *supra* note 95, at 1335-1338.

113. 18 U.S.C. § 1956(a)(2) provides in relevant part:

(2) Whoever transports, transmits, or transfers, or attempts to transport, transmit, or transfer a monetary instrument or funds from a place in the United States to or through a place outside the United States or to a place in the United States from or through a place outside the United States—

(A) with the intent to promote the carrying on of specified unlawful activity; or

(B) knowing that the monetary instrument or funds involved in the transportation, transmission, or transfer . . . is designed in whole or in part—

(i) to conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity or

Section 1956(a)(2) of the MLCA is “‘designed to illegalize international money laundering transactions,’ and ‘covers situations in which money is being laundered . . . by transferring it out of the United States.’”¹¹⁴

Section 1956(f) explicitly recognizes extraterritorial jurisdiction over conduct prohibited by this section if a U.S. citizen, or non-citizen if the conduct is in the United States and the conduct involves funds exceeding US\$10,000.¹¹⁵ At the same time, one U.S. circuit court has ruled that the international money laundering statute does not criminalize the transfer of funds taking place entirely outside of the United States.¹¹⁶ The transfer of a monetary instrument or funds must occur between the territory of the United States and another country.¹¹⁷

In *United States v. Kramer*, the Eleventh Circuit reversed a defendant's conviction for money laundering based on the transfer of US\$9.5 million from Switzerland to Luxembourg.¹¹⁸ The court rejected the government's argument that the statute was satisfied because the transfer of money in Europe was part of a continuing transaction that originated in the United States. The court opined that the statute does not make money launder-

(ii) to avoid a transaction reporting requirement under State or Federal law, shall be sentenced to a fine of not more than \$500,000 or twice the value of the monetary instrument or funds involved in the transportation, transmission, or transfer whichever is greater, or imprisonment for not more than twenty years, or both.

18 U.S.C. § 1956(a)(2) (1994).

114. *United States v. Piervinanzi*, 23 F.3d 670, 680 (2d Cir. 1994) (quoting S. REP. NO. 99-433 (1986)); see *United States v. Samour*, 9 F.3d 531, 536 (6th Cir. 1993) (“In subsection (a)(2), Congress outlawed the physical transportation or wire transfer of tainted funds across United States borders.”), *rev'd in part*, *United States v. Reed*, 77 F.3d 139 (6th Cir.), *cert. denied*, 517 U.S. 1246 (1996).

115. 18 U.S.C. § 1956(f). This section provides that:

there is extraterritorial jurisdiction . . . if

- (1) the conduct is by a United States citizen or, in the case of a non-United States citizen, the conduct occurs in part in the United States; and
- (2) the transaction or series of related transactions involves funds or monetary instruments of a value exceeding \$10,000.

Id.

116. See *United States v. Savage*, 67 F.3d 1435, 1442 (9th Cir. 1995) (upholding convictions for international money laundering involving transfer of funds from Austrian bank accounts back to United States); *United States v. Beddow*, 957 F.2d 1330, 1334 (6th Cir. 1992) (upholding conviction for international money laundering for transporting money from United States to Brazil).

117. *Beddow*, 957 F.2d at 1335.

118. *United States v. Kramer*, 73 F.3d 1067, 1072 (11th Cir. 1996).

ing a continuing offense. Instead, the court found that the legislative history reveals that each transaction or transfer of money constitutes a separate offense. Because the defendant was involved in only one transaction, and that transaction occurred outside of the United States, the defendant's conviction could not be upheld on that basis.¹¹⁹

The international money laundering statute is structured in many respects like the domestic money laundering provision. Both statutes contain a promotion and concealment provision. Sections 1956(a)(1)(A)(i) and (a)(2)(A) prohibit the use of monies intended to "promote the carrying on of specified unlawful activity."¹²⁰ Similarly, both sections 1956(a)(1)(B)(i) and (a)(2)(B)(i) criminalize conduct intended to conceal or to disguise the proceeds of specified unlawful activity.¹²¹

The international and domestic money laundering statutes, however, differ in two significant respects. First, the domestic money laundering statute requires proof that the defendant engaged in a "financial transaction" with some form of unlawful proceeds and that the financial transaction was intended to "promote the carrying on of specified unlawful activity" or was designed to "conceal or disguise the nature, the location, the source, the ownership, or the control of the proceeds of specified unlawful activity."¹²² For purposes of the MLCA, the term "financial transaction" is a term of art. "[T]ransaction" is defined in section 1956(c)(3) and includes the "purchase, sale, load, pledge, gift, transfer, delivery, or other disposition."¹²³ The term "financial transaction" is defined in section 1956(c)(4) and means:

a transaction involving the movement of funds by wire or other means or involving one or more monetary instruments, which in any way or degree affects interstate or foreign commerce, or a transaction involving the use of a financial institution which is engaged in, or the activities of which affect, interstate or foreign commerce in any way or degree.¹²⁴

119. *Id.* at 1072-73.

120. *See* 18 U.S.C. § 1956(a)(1)(A)(i), (a)(2)(A) (1994).

121. *See id.* § 1956(a)(1)(B)(i), (a)(2)(B)(i).

122. *Id.* § 1956(a)(1)(A)(i), (a)(1)(B)(i).

123. *Id.* § 1956(c)(3).

124. *Id.* § 1956(c)(4).

Proof of a financial transaction is an indispensable element of the offense of domestic money laundering.

The international money laundering provision, on the other hand, does not require a showing that the defendant engaged in a financial transaction. Section 1956(a)(2)(A) punishes the mere transportation, transmission, or transfer of monetary instruments of funds extraterritorially with the intent to promote the specified unlawful activity. Likewise, section 1956(a)(2)(B)(i) proscribes international money transfers knowing that the monies involved represent some form of unlawful activity, and the transportation, transmission, or transfer was designed to conceal or to disguise the proceeds of specified unlawful activity. Thus, a person could violate either the promotion or concealment provision of section 1956(a)(2) without actually participating in an unlawful transaction as defined by section 1956(c). Furthermore, the federal courts construing the domestic money laundering statute have emphatically stated that the mere transportation of illicit proceeds does not constitute a financial transaction within the meaning of section 1956(a)(1).¹²⁵ In contrast, pursuant to section 1956(a)(2), the transportation of monies, coupled with the requisite intent or *mens rea*, would support a conviction for international money laundering.¹²⁶

The second major distinction involves section 1956(a)(2)(A), the international money laundering promotion provision.¹²⁷ The funds transported with the intent to promote unlawful activity need not be derived from specified unlawful activity. In other words, there is no requirement that the funds involved first be generated by unlawful activity. The statute proscribes transporting, transmitting, or transferring funds overseas, even if those funds were lawfully derived, if the intent was to promote the carrying on of specified unlawful activity.¹²⁸

In *United States v. Piervinanzi*,¹²⁹ the Second Circuit explained the distinction between the domestic and international money laundering statutes:

125. See *United States v. Reed*, 77 F.3d 139, 143 (6th Cir.), *cert. denied*, 116 S. Ct. 2504 (1996); *United States v. Dimeck*, 24 F.3d 1239, 1246 (10th Cir. 1994).

126. 18 U.S.C. § 1956(a)(2) (1994).

127. 18 U.S.C. § 1956(a)(2)(A).

128. *Id.*

129. *United States v. Piervinanzi*, 23 F.3d 670 (2d Cir. 1994).

Sections 1956(a)(1), the domestic money laundering statute, penalizes financial transactions that "involv[e] . . . the proceeds of specified unlawful activity." The provision requires first, that the proceeds of specified unlawful activity be generated, and second, that the defendant, knowing the proceeds to be tainted, conduct[s], or attempts to conduct a financial transaction with these proceeds with the intent to promote specified unlawful activity. By contrast, section 1956(a)(2) contains no requirement that "proceeds" first be generated by unlawful activity, followed by a financial transaction with those proceeds, for criminal liability to attach. Instead, it penalizes an overseas transfer "with the intent to promote the carrying on of specified unlawful activity."¹³⁰

In *United States v. Hamilton*, the Fifth Circuit added:

The two provisions seek to attack two different types of criminal conduct. Section 1956(a)(1) specifically refers to "transactions" involving "proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a)(1). Section 1956(a)(2), on the other hand, prohibits the international "transport[ation], transmit[al], or transfer[al] [of] . . . a monetary instrument or funds" in cases where such funds are intended to promote unlawful activities. A person could, in effect, violate section 1956(a)(2) without actually participating in an unlawful transaction as defined by section 1956(a)(1). For example, a foreign drug cartel might transfer proceeds from a legitimate business enterprise into a bank account in the United States. Such a transfer would not violate section 1956(a)(1) because the proceeds would not represent "proceeds of unlawful activities." Under section 1956(a)(2), however, the same transfer would be criminalized if the legitimate proceeds of that bank account were intended to provide the capital necessary for expanding a drug enterprise in the United States.¹³¹

The United States appears to be in compliance with its obligations imposed under Article 3(1)(b) of the 1988 U.N. Drug Convention. The Convention, however, requires more than the enactment of laws criminalizing money laundering. In order to impact international drug trafficking successfully, the Convention requires that these money laundering statutes be aggressively enforced. A close examination of both federal district court and circuit court decisions reveal that there have been few

130. *Id.* at 679-80.

131. *United States v. Hamilton*, 931 F.2d 1046, 1051-52 (5th Cir. 1991).

federal prosecutions brought under 18 U.S.C. § 1956(a)(2), the international money laundering provision, when the laundered funds were derived from drug trafficking. Instead, the emphasis has been on domestic rather than international money laundering prosecutions. The anti-money laundering statutes have not been aggressively utilized to prosecute persons involved in transporting or transferring illicit drug proceeds "from a place in the United States to or through a place outside the United States" with the intent to promote the carrying on of drug trafficking activity or with the design to conceal the nature, location, source, or ownership of the illicit proceeds.¹³²

Over the last ten years, there have been eighty-eight reported federal cases that involved a conviction under 18 U.S.C. § 1956(a)(2). Of these cases, only twenty-three involved the laundering of illicit drug proceeds.¹³³ Stated another way, in only twenty-three cases did the "specified unlawful activity," which served as the basis for the money laundering convictions, constitute drug trafficking. When placed in perspective, twenty-three cases over a ten-year period translates into less than three international drug money laundering cases per year.¹³⁴ Consid-

132. 18 U.S.C. § 1956(a)(2) (1994).

133. *See* *United States v. Myers*, 117 F.3d 1423 (8th Cir. 1997); *United States v. Parrado*, 99 F.3d 402 (2d Cir. 1995); *United States v. Mir*, 52 F.3d 335 (9th Cir. 1995); *United States v. Claudio*, 44 F.3d 10 (1st Cir. 1995); *United States v. Diaz-Cano*, 41 F.3d 1514 (9th Cir. 1994); *United States v. Garcia*, 37 F.3d 1359 (9th Cir. 1994); *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994); *United States v. Romsey*, 975 F.2d 556 (8th Cir. 1992); *United States v. Awan*, 966 F.2d 1415 (11th Cir. 1992); *United States v. Beddow*, 957 F.2d 1330 (6th Cir. 1992); *United States v. Ryce*, 944 F.2d 903 (4th Cir. 1991); *United States v. Ramos*, 923 F.2d 1346 (9th Cir. 1991); *United States v. Kimball*, 884 F.2d 1274 (9th Cir. 1989); *Villegas v. United States*, No. CV-96-1418, 1997 WL 35510 (S.D.N.Y. Jan. 30, 1997); *Villegas v. United States*, No. CV-96-1419, 1997 WL 35523 (S.D.N.Y. Jan. 30, 1997); *Mouawad v. United States*, No. CV-96-2609, 1996 WL 518080 (E.D.N.Y. Aug. 30, 1996); *United States v. Rivera*, No. CR-89-00031-04, 1992 WL 135231 (E.D.N.Y. June 3, 1992); *Guapacha v. United States*, No. CV-92-5456, 1992 WL 391378 (E.D.N.Y. Dec. 3, 1992); *United States v. Hanna*, 942 F. Supp. 783 (E.D.N.Y. 1996); *United States v. Ailemen*, 893 F. Supp. 888 (N.D. Cal. 1995); *United States v. Christunas*, 830 F. Supp. 394 (E.D. Mich. 1993); *United States v. Sierra-Garcia*, 760 F. Supp. 252 (E.D.N.Y. 1991); *United States v. Parramore*, 720 F. Supp. 799 (N.D. Cal. 1989).

134. In fact, no more than five federal international money laundering decisions were reported in any one year. There were five cases reported in both 1992 and 1995. Of course, there may be other possible explanations for the low number of federal cases citing 18 U.S.C. § 1956(a)(2). Perhaps the defendant plead guilty to a section 1956(a)(2) count or entered a guilty plea to some other count in exchange for an agreement to dismiss the international money laundering charge, and these convictions were never appealed or challenged on a writ of habeas corpus, 28 U.S.C. § 2255. In such a case, no reported case opinion would appear. At the same time, the dearth of

ering that there are ninety-three U.S. Attorney's offices in the country, this data suggests that during this period a substantial majority of the federal prosecutor's offices failed to prosecute even one international drug money laundering case.¹³⁵ Additionally, federal prosecutions of professional money launderers, who launder money for major drug cartels, are even more rare.¹³⁶ This sparse record of international drug money laundering prosecutions provides compelling evidence that section 1956(a)(2) has not been aggressively enforced.

Finally, while there have been numerous prosecutions under 18 U.S.C. § 1956(a)(1), the domestic money laundering statute, those prosecutions have seldom been directed at major international drug trafficking organizations. In fact, in many instances section 1956(a)(1) has been charged in cases wholly unrelated to drug trafficking.¹³⁷ In other cases, the amount of drug money involved in the laundering activity was relatively small.¹³⁸

international money laundering cases is illuminating, evidencing the fact that 18 U.S.C. § 1956(a)(2) is seldom used by federal prosecutors.

135. In contrast, research of Federal Circuit Court of Appeals cases revealed that in 1997 alone, there were over 90 reported cases involving domestic money laundering conviction under 18 U.S.C. § 1956(a)(1).

136. *See, e.g.*, *United States v. Carr*, 25 F.3d 1194 (3d Cir. 1994) (defendant convicted of attempting to transport US\$186,000 outside United States to Colombia with intent to disguise or conceal its nature, source, ownership, or control); *Beddow*, 957 F.2d at 1330 (defendant convicted of transporting US\$47,000 in cash and traveler's checks derived from illegal drug sales out of country when he traveled to Brazil).

137. Section 1956(a) has often been used where the underlying "specified unlawful activity" is fraud, rather than drug trafficking. *See, e.g.*, *United States v. Habhab*, 132 F.3d 410, 414 (8th Cir. 1997) (underlying specified unlawful activity was wire fraud); *United States v. Nattier*, 127 F.3d 655, 658-59 (8th Cir. 1997) (affirming money laundering conviction for laundering embezzled bank funds); *United States v. Hare*, 49 F.3d 447, 451-52 (8th Cir. 1995) (charging wire fraud as underlying specified unlawful activity); *United States v. Manarite*, 44 F.3d 1407, 1416 (9th Cir.) (basing money laundering conviction scheme to skim gambling casino chips), *cert. denied*, 515 U.S. 1158 (1995); *United States v. LeBlanc*, 24 F.3d 340, 346 (1st Cir. 1994) (charging illegal gambling as underlying specified unlawful activity); *United States v. Miller*, 22 F.3d 1075, 1077 (11th Cir. 1994) (same); *United States v. Cavalier*, 17 F.3d 90, 91 (5th Cir. 1994) (basing money laundering conviction on mailing false auto theft report that caused insurance company to mail check to satisfy lien on vehicle); *United States v. Paramo*, 998 F.2d 1212, 1215 (3d Cir. 1993) (charging money laundering based on deposit of embezzled tax refund checks into defendant's bank account); *United States v. Montoya*, 945 F.2d 1068, 1075 (9th Cir. 1991) (granting money laundering conviction based on deposit of US\$3,000 of bribery proceeds into defendant's bank account). *But see* *United States v. Otis*, 127 F.3d 829, 838 (9th Cir. 1997) (affirming money laundering conviction where defendant intended to assist Cali cartel in laundering its drug money).

138. *See, e.g.*, *United States v. Westbrook*, 119 F.3d 1176, 1191-92 (5th Cir. 1997)

While Article 3(b)(1) of the Convention imposes an obligation on the parties to the 1988 U.N. Drug Convention to enact domestic anti-money laundering legislation, it further imposes a duty to enforce such legislation. Based on the number of section 1956(a)(2) prosecutions over the past ten years, coupled with the relatively few cases directed at persons laundering funds for major drug enterprises, it is highly questionable whether the United States is in compliance with this second duty imposed by Article 3(b)(1).

C. Domestic Asset Forfeiture Legislation Intended to Foster International Cooperation

1. Forfeiting Property Located Abroad¹³⁹

In 1992, the MLCA was amended to extend U.S. courts' subject matter jurisdiction to properties located outside the United States.¹⁴⁰ Prior to 1992, 28 U.S.C. § 1355 simply provided that district courts had jurisdiction over forfeiture proceedings commenced pursuant to the laws of the United States. A district court, however, was not authorized to issue process against property located outside its district. "This limitation hindered the effectiveness of the forfeiture laws, as some courts concluded that district courts lacked *in rem* jurisdiction in actions where the property was located within the United States but outside the district in which the forfeiture action was brought."¹⁴¹ Of course, the argument that the district court lacked *in rem* jurisdiction applied with even more force when the property was located outside the United States.

This deficiency in the forfeiture law was cured by recent amendments to 28 U.S.C. § 1355, which extend *in rem* jurisdic-

(basing money laundering convictions on purchase of two vehicles from money derived from drug trafficking); *United States v. Laurenzana*, 113 F.3d 689, 692 (7th Cir. 1997) (convicting defendant money laundering based on payment of US\$2,500 cash bond to secure bail of co-conspirator); *United States v. Sanders*, 928 F.2d 940, 946 (10th Cir.) (reversing money laundering convictions where defendant openly purchased two automobiles with proceeds from drug trafficking), *cert. denied*, 502 U.S. 845 (1991).

139. This subsection is derived in part from JIMMY GURULÉ & SANDRA GUERRA, *THE LAW OF ASSET FORFEITURE* 342-44 (1998) [hereinafter *ASSET FORFEITURE*].

140. Anti-Money Laundering Act, 28 U.S.C. § 1355(b) (1994).

141. *United States v. All Funds on Deposit in Any Accounts (Meza or De Castro)*, 63 F.3d 148, 151 (2d Cir. 1995).

tion to property located in a foreign country.¹⁴² Section 1355(b)(1) enlarges the subject matter jurisdiction of the federal courts, authorizing forfeiture of property located in another country.¹⁴³ Thus, drug dealers can no longer evade U.S. forfeiture laws by merely depositing drug proceeds in a bank account in another country. The federal courts may order forfeiture of property forfeitable under the laws of the United States regardless of its locus. Despite its importance, there are only two reported federal cases discussing 28 U.S.C. § 1355(b)(1), which suggests that this provision has not been frequently used by federal prosecutors.

In *United States v. All Funds on Deposit in Any Accounts (Meza or De Castro)*,¹⁴⁴ the court applied 28 U.S.C. § 1355(b)(1) to property located in a foreign country.¹⁴⁵ In *All Funds*, federal authorities targeted funds in several bank accounts at various financial institutions in London, England, believed to represent the proceeds of an international drug trafficking and money laundering organization headed by Jose Santacruz Londono. Based on a request made through the U.S. Department of Justice, British authorities cooperated and obtained a court order from England's High Court of Justice, Queen's Bench Division, restraining the suspect bank accounts.¹⁴⁶

The U.S. government filed a civil forfeiture action in federal district court seeking forfeiture of the funds. The district court denied the claimant's motion to dismiss the forfeiture complaint

142. 28 U.S.C. § 1355(b). The amendment to section 1335 added a new part (b), which reads, in pertinent part:

(b) (1) A forfeiture action or proceeding may be brought in—

(A) the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred, or

(B) any other district where venue for the forfeiture action or proceeding is specifically provided for in section 1395 of this title or any other statute.

(2) Whenever property subject to forfeiture under the laws of the United States is located in a foreign country, or has been detained or seized pursuant to legal process or competent authority of a foreign government, an action or proceeding for forfeiture may be brought [in the district court for the district in which any of the acts or omissions giving rise to the forfeiture occurred], or in the United States District Court for the District of Columbia.

Id.

143. *Id.*

144. *All Funds on Deposit In Any Account (Meza or De Castro)*, 63 F.3d 148.

145. *Id.* at 152.

146. See *id.* at 149-50 (discussing receipt of Queen's Bench Division order of March 18, 1994 in *In re: JL and Drug Trafficking Offences Act 1986*).

on the ground that the district court lacked *in rem* jurisdiction over the funds because it lacked constructive control over the funds. The court ordered forfeiture of the funds pursuant to 18 U.S.C. § 981(a)(1)(A) and 21 U.S.C. § 881(a)(6).¹⁴⁷

On appeal, the Second Circuit affirmed the judgment of the district court. The Second Circuit reaffirmed the principle that "in order to institute and perfect proceedings in rem, . . . the thing should be actually or constructively within the reach of the Court," and posited that this rule equally applies to property located in another country.¹⁴⁸ The court held that "in order to initiate a forfeiture proceeding against property located in a foreign country, the property must be within the actual or constructive control of the district in which the action is commenced."¹⁴⁹ The court concluded that the U.S. government had met its burden by demonstrating that the British government had agreed to turn over at least a portion of the seized funds to the United States, thereby vesting the district court with the requisite constructive control over the funds.¹⁵⁰

The second reported opinion involves the retroactive application of section 1355(b)(1). In *United States v. Certain Funds at the Hong Kong and Shanghai Banking Corp.*,¹⁵¹ the U.S. government sought civil *in rem* forfeiture of certain bank accounts alleged to contain the proceeds of a heroin smuggling operation from Hong Kong to New York.¹⁵² Following the acquittals of the owners of the accounts on criminal drug charges in Hong Kong, the Hong Kong government immediately froze the assets at the request of the U.S. government.¹⁵³ The United States then filed a federal asset forfeiture action in the Eastern District of New York against properties held in Hong Kong.¹⁵⁴

The Second Circuit permitted the retroactive application of the 1992 amendment that gives district courts jurisdiction to hear civil *in rem* forfeiture cases involving properties located

147. *Id.* at 152.

148. *Id.* (quoting *United States v. James Daniel Good Real Property*, 510 U.S. 43, 63 (1993) (citations omitted)).

149. *Id.*

150. *Id.* at 154.

151. *United States v. Certain Funds at the Hong Kong and Shanghai Banking Corp.*, 96 F.3d 20 (2d Cir. 1996).

152. *Id.* at 22.

153. *Id.*

154. *Id.*

outside the United States.¹⁵⁵ The court found that the provision did not create any new rights or legal consequences for past conduct, and, thus, it could be applied retroactively.¹⁵⁶ The court also rejected the defendant's asserted *ex post facto* Clause argument, finding that the statute gives the courts jurisdiction to hear civil forfeiture cases and that these are not "penal" for purposes of the *ex post facto* clause.¹⁵⁷

2. Forfeiting Drug Proceeds From Other Countries Found in the United States¹⁵⁸

With regard to real or personal property found within the United States and derived from, or traceable to, the proceeds of drug crimes in other countries, the United States may file a civil forfeiture action pursuant to the MLCA.¹⁵⁹ 18 U.S.C. § 981(a)(1)(B) authorizes forfeiture of:

[a]ny property, real or personal, within the jurisdiction of the United States, constituting, derived from or traceable to, any proceeds obtained directly or indirectly from an offense against a foreign nation involving the manufacture, importation, sale, or distribution of a controlled substance . . . , within whose jurisdiction such offense would be punishable by death or imprisonment for a term exceeding one year and which would be punishable under the laws of the United States by imprisonment for a term exceeding one year if such act or activity constituting the offense against the foreign nation had occurred within the jurisdiction of the United States.¹⁶⁰

This provision permits the civil forfeiture of property located in the United States that is derived from, or traceable to, a

155. *Id.* at 27.

156. *Id.* at 23-24.

157. *Id.* at 25-26. The court found that the U.S. Supreme Court's decision in *United States v. Usery*, 518 U.S. 267 (1996), had "clarified and limited its prior holding in *Austin*" to apply only to the Excessive Fines Clause. *United States v. Certain Funds at the Hong Kong and Shanghai Banking Corp.*, 96 F.3d 20, 25 (2d Cir. 1996). The court in *Usery* held that civil forfeitures are not punishment for purposes of the Double Jeopardy Clause. *Usery*, 518 U.S. at 273. Likewise, the Second Circuit found that if the civil forfeiture statutes "are not penal or criminal, then there cannot be a 'substantial doubt' as to their compatibility with the Ex Post Facto Clause." *Certain Funds*, 96 F.3d at 26.

158. This subsection is adapted in part from ASSET FORFEITURE, *supra* note 139, at 344-45.

159. 18 U.S.C. § 981(a)(1)(B) (1994).

160. *Id.*

violation of the drug laws of another country involving the manufacture, importation, sale, or distribution of controlled substances.¹⁶¹ The drug violation in another country, however, must be one that is punishable by more than one year imprisonment in that country, and that would have been punishable for such a term had the offense occurred in the United States. In other words, the non-U.S. drug offense giving rise to the forfeiture must constitute a felony in both the foreign country and United States. Additionally, section 981(a)(1)(B) is limited to forfeiture of drug proceeds, or property traceable to the drug offense, and does not extend to property that was used to facilitate the violation of the countries drug law. Thus, for example, an aircraft located in the United States that was purchased with drug proceeds derived from a drug crime in another country would be forfeitable under section 981(a)(1)(B), while an aircraft similarly located that was used to facilitate a drug trafficking offense in another country would not.¹⁶²

Section 981(a)(1)(B) would also enable the United States to assist other countries in forfeiting property located in the United States that was derived from criminal acts committed in the territory of those countries.¹⁶³ This provision would appear to implement Article 5(4)(a)(i) of the 1988 U.N. Drug Convention, which provides:

(4)(a) Following a request made pursuant to this article by another party having jurisdiction over an offense established in accordance with article 3, paragraph 1, the party in whose territory proceeds, property, instrumentalities . . . referred to in paragraph 1 of this article are situated shall:

(i) submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such order is granted, give effect to it.¹⁶⁴

The U.S. civil forfeiture action of drug proceeds in another country is aided by 18 U.S.C. §§ 981(i)(3) and (4), which permit the use of forfeiture orders and criminal convictions from other countries in domestic forfeiture proceedings.¹⁶⁵ Section 981(i)(3) authorizes the admission into evidence of a certified

161. *Id.*

162. *Id.*

163. *Id.*

164. U.N. Drug Convention, *supra* note 6, art. 5(4)(a)(i), 28 I.L.M. at 505.

165. 18 U.S.C. § 981(i)(3), (4) (1994).

order or judgment of forfeiture by a court of competent jurisdiction in another country concerning the property that is the subject of forfeiture under section 981(a)(1)(B).¹⁶⁶ Moreover, section 981(i)(3) provides that such certified order or judgment of forfeiture, "when admitted into evidence, shall constitute probable cause that the property forfeited by such order or judgment of forfeiture is subject to forfeiture and creates a rebuttable presumption of the forfeitability of such property."¹⁶⁷

Section 981(i)(4) admits into evidence a certified order or judgment of conviction by a court of competent jurisdiction in another country concerning the unlawful drug activity giving rise to forfeiture under section 981(a)(1)(B).¹⁶⁸ Thus, non-U.S. judgments of conviction for a substantive drug offense are admissible into evidence. The statute further provides that "[s]uch certified order or judgment of conviction, when admitted into evidence, creates a rebuttable presumption that the unlawful drug activity giving rise to forfeiture under this section has occurred."¹⁶⁹ The forfeiture statutes specifically granting the courts jurisdiction over forfeitures based on non-U.S. criminal

166. *Id.* § 981(i)(3).

167. *Id.* 18 U.S.C. § 981(i)(3) would appear to constitute substantial compliance with the 1988 U.N. Drug Convention, Article 5(4)(a)(ii), which requires that a party give legal effect to a foreign judgment of forfeiture. Article 5(4)(a)(ii) provides that a party submit to its competent authorities, "with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting party . . . , in so far as it relates to proceeds, property, instrumentalities . . . situated in the territory of the requested party." U.N. Drug Convention, *supra* note 6, art. 5(4)(a)(ii), 28 I.L.M. at 505.

168. 18 U.S.C. § 981(i)(4).

169. *Id.* Sections 981(a)(1)(B), (i)(3), and (i)(4) appear to implement the requirements of Article 5(4)(a) of the 1988 U.N. Drug Convention. See *United States v. Vacant Land Known as Los Morros*, 885 F. Supp. 1329, 1331 (S.D. Cal. 1995) ("In enacting § 981(a)(1)(B) and subsection (i)(3), Congress intended to provide a statutory means of complying with the United Nations' treaty obligations."). Article 5(4)(a) provides in relevant part:

(a) Following a request made pursuant to this article by another party having jurisdiction over an offense established in accordance with article 3, paragraph 1, the party in whose territory proceeds, property, instrumentalities . . . are situated shall:

(i) Submit the request to its competent authorities for the purpose of obtaining an order or confiscation and, if such order is granted, give effect to it; or

(ii) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by the requesting party in accordance with paragraph 1 of this article, in so far as it relates to proceeds, property, instrumentalities . . . situated in the territory of the requested party.

U.N. Drug Convention, *supra* note 6, art. 5, 28 I.L.M. at 504.

acts enable federal prosecutors to assist in international forfeitures. Unfortunately sections 981(a)(1)(B), 981(a)(i)(3), and 981(a)(i)(4) have seldom been used by federal prosecutors.¹⁷⁰

IV. *ENFORCEMENT OF THE 1988 U.N. DRUG CONVENTION THROUGH THE INTERNATIONAL COURT OF JUSTICE AND INTERNATIONAL ASSET SHARING*

A. International Court of Justice

The effectiveness of the U.N. Drug Convention is directly dependent on party compliance with the duties and obligations set forth therein. The laudable goals enumerated in the Preamble to the Convention will never be realized if parties are free to ignore, at will, their obligations under the Convention. At the same time, there is little incentive for parties to comply if enforcement of the 1988 U.N. Drug Convention is never sought.

The 1988 U.N. Drug Convention sets forth two procedural routes for settling legal disputes relating to the interpretation or application of the Convention. First, Article 32(1) encourages settlement of disputes by "negotiation, inquiry, mediation, conciliation, arbitration, recourse to regional bodies, judicial process or other peaceful means of their own choice."¹⁷¹ Second, pursuant to Article 32(2), the parties consent to having disputes resolved by the International Court of Justice ("ICJ" or the "Court"), when legal matters cannot be resolved through the means provided by Article 32(1).¹⁷² Article 32(2) of the Convention states that "[a]ny such dispute which cannot be settled in the manner prescribed in paragraph 1 of this article shall be referred, at the request of any one of the State parties to the dispute, to the International Court of Justice for decision."¹⁷³ Article 32(4) qualifies the jurisdiction of the ICJ.¹⁷⁴ Article 32(4) of the Convention states:

Each State, at the time of signature or ratification, acceptance

170. There is only one reported federal opinion discussing 18 U.S.C. §§ 981(a)(1)(B), (i)(3). See *Vacant Land Known as Los Morros*, 885 F. Supp. at 1331. There are no reported federal opinions citing 18 U.S.C. § 981(i)(4).

171. U.N. Drug Convention, *supra* note 6, art. 32(1), 28 I.L.M. at 525.

172. *Id.* art. 32(1), 28 I.L.M. at 525.

173. *Id.* art. 32(2), 28 I.L.M. at 525.

174. *Id.* art. 32(4), 28 I.L.M. at 525.

or approval of this Convention or accession thereto . . . may declare that it does not consider itself bound by paragraph 2 . . . of this article. The other parties shall not be bound by paragraph 2 . . . with respect to any party having made such a declaration.¹⁷⁵

Thus, unless a party has declared that it is not bound by Article 32(2), it consents to the jurisdiction of the ICJ on legal matters of interpretation and application of the 1988 U.N. Drug Convention.

The ICJ is the principal judicial organ of the United Nations.¹⁷⁶ It was created by the U.N. Charter¹⁷⁷ and by the Statute of the Court, which was made an integral part of the U.N. Charter.¹⁷⁸ The Court is comprised of fifteen judges elected by a majority of the U.N. Security Council and General Assembly.¹⁷⁹ Article 94(1) of the U.N. Charter obliges each member of the United Nations to comply with a decision of the ICJ in any case to which it is a party.¹⁸⁰ In the event that a party fails to perform the obligations incumbent upon it under a judgment rendered by the Court, "the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgment."¹⁸¹ Thus, in appropriate cases, the Security Council may impose economic sanctions for failure to comply with a judgment of the ICJ.

As outlined in Article 36 of the Statute of the Court, the ICJ may properly assert jurisdiction in three different scenarios.

175. *Id.*

176. See U.N. CHARTER art. 92. Article 7 of the U.N. Charter establishes the International Court of Justice ("ICJ" or the "Court") as a principal organ of the United Nations. U.N. CHARTER art. 7.

177. *Id.* arts. 7(1), 36(3), 92-96.

178. Both the U.N. Charter and the Statute of the International Court of Justice were signed at San Francisco on June 26, 1945. Statute of the International Court of Justice, June 16, 1945, 59 Stat. 1055, 3 Bevens 1179 [hereinafter ICJ Statute]. After the election of the Court's first members, the new Court met for the first time at the Hague on April 1, 1946. The ICJ has therefore been in existence over fifty years. See Robert Y. Jennings, *The International Court of Justice After Fifty Years*, 89 AM. J. INT'L L. 493, 493 (1995).

179. ICJ Statute, *supra* note 178, arts. 3-4, 59 Stat. at 1055, 3 Bevens at 1179-80 (describing number and selection of judges of ICJ).

180. U.N. CHARTER art. 94(1) ("Each Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party.").

181. U.N. CHARTER art. 94(2).

First, states can voluntarily bring a specific dispute between them to the court on an *ad hoc* basis. Second, treaties and conventions, including the U.N. Charter, can explicitly refer matters to the ICJ through their dispute resolution provisions. Third, state parties can accept the general jurisdiction of the court over all issues arising under international law.¹⁸² The second basis of jurisdiction is referred to as "compulsory jurisdiction." "Jurisdiction becomes compulsory when a provision of a bilateral or multilateral treaty stipulates that the ICJ will resolve disputes."¹⁸³

The ICJ has jurisdiction over legal disputes related to the 1988 U.N. Drug Convention under the compulsory jurisdiction theory. As previously discussed, pursuant to Article 36(1) of the Statute of the ICJ, the Court has jurisdiction over matters "specifically provided for in . . . treaties and conventions in force."¹⁸⁴ The 1988 U.N. Drug Convention, Article 32(2), specifically provides that any "dispute which cannot be settled in the manner prescribed [by Article 32(1)] . . . shall be referred, at the request of any one of the State parties to the dispute, to the International Court of Justice for decision."¹⁸⁵

Because the Court's jurisdiction properly extends to disputes under the Convention, enforcement should be sought through the ICJ. Thus, for example, a party to the Convention could, and should, file a legal action with the ICJ against certain

182. David M. Reilly & Sarita Ordonez, *Effect of the Jurisprudence of the International Court of Justice on National Courts*, 28 N.Y.U. J. INT'L L. & POL. 435, 440 (1996). Article 36 of the ICJ Statute states in relevant part:

- (1) The jurisdiction of the Court comprises all cases which the parties refer to it and all matters specially provided for in the Charter of the United Nations or in treaties and conventions in force.
- (2) The state parties to the present Statute may at any time declare that they recognize as compulsory *ipso facto* and without special agreement, in relation to any other state accepting the same obligation, the jurisdiction of the Court in all legal disputes concerning:
 - a. the interpretation of a treaty;
 - b. any question of international law;
 - c. the existence of any fact which, if established, would constitute a breach of an international obligation; and
 - d. the nature or extent of the reparation to be made for the breach of an international obligation.

ICJ Statute, *supra* note 178, art. 36, 59 Stat. at 1060, 3 Bevans at 1186-87.

183. See H. Vern Clemons, Comment, *The Ethos of the International Court of Justice Is Dependent upon the Statutory Authority Attributed to Its Rhetoric: A Metadiscourse*, 20 *FORDHAM INT'L L.J.* 1479, 1491 (1997).

184. ICJ Statute, *supra* note 178, art. 36(1), 59 Stat. at 1060, 3 Bevans at 1186.

185. U.N. Drug Convention, *supra* note 6, art. 32(2), 28 I.L.M. at 525.

major drug-producing or major drug-transit countries, e.g., Mexico, Colombia, or Bolivia, claiming that they have not complied with the 1988 U.N. Drug Convention. A declaratory judgment finding non-compliance with the Convention issued by the ICJ would carry significant legal consequences towards eventual compliance. Article 94 of the U.N. Charter provides that "[e]ach Member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party."¹⁸⁶ Failure to adhere to an ICJ judgment would constitute a violation of the U.N. Charter, specifically Article 94. Furthermore, treaty law is part of U.S. law.¹⁸⁷ Finally, disregarding an ICJ judgment violates principles of customary international law. "One such principle holds that treaties in force shall be observed."¹⁸⁸

Additionally, such a decision, having been rendered by an impartial and independent international tribunal, would likely receive the broad support of the international community. This adverse ruling could be used to pressure the offending nation into taking constructive steps towards compliance with the Convention. Furthermore, in the extreme case, where government officials have not only failed to comply with the express terms of the Convention, but also have actually facilitated or condoned narcotics trafficking and money laundering within their territory, the complainant-party might seek recourse with the U.N. Security Council.¹⁸⁹ The authority of the Security Council could be brought to bear on the offending nation to force compliance. Pursuant to the Security Council's chapter VII powers,¹⁹⁰ the non-complying party could suffer Security Council sanctions.¹⁹¹

186. See U.N. CHARTER art. 94(2).

187. It should be noted that Article VI(2) of the U.S. Constitution establishes that "all Treaties made . . . under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. VI(2). A claim of non-compliance with the 1988 U.N. Drug Convention is thus actionable in U.S. federal court.

188. *Committee of U.S. Citizens in Nicaragua v. Reagan*, 859 F.2d 929, 935 (D.C. Cir. 1988).

189. U.N. CHARTER art. 94(2).

190. The U.N. Security Council's authority to impose sanctions emanates from Chapter VII of the U.N. Charter. Article 39 of Chapter VII provides: "The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41 and 42, to maintain or restore international peace and security." U.N. CHARTER art. 39.

191. *Id.* Pursuant to Article 41, the Security Council may decide what measures

At the very least, any adverse ruling that a party is not in compliance would send a powerful message that the Convention will be enforced and that parties will not be permitted simply to ignore the duties and obligations imposed thereunder.

This approach is certainly more preferable than the current situation where every year the United States threatens to "decertify" a country for non-compliance with 22 U.S.C. § 2291h of the Foreign Assistance Act.¹⁹² Unlike a decision by the ICJ, the certification process is a unilateral action by the United States. As such, it may not be perceived as impartial in nature. The support of the international community is far from guaranteed. Finally, if the United States does not have outstanding foreign aid commitments with the "decertified" party, the threat of withholding foreign assistance will not motivate compliance.

Unfortunately, the United States has compromised its ability to seek treaty compliance through the ICJ. When signing the 1988 U.N. Drug Convention, the United States declared that it does not consider itself bound by Article 32(2) of the Convention.¹⁹³ Consequently, pursuant to Article 32(4), when a party declares that it is not bound by Article 32(2), other parties to the Convention shall not be bound by paragraph 2 with respect to any party having made such a declaration.¹⁹⁴ Thus, the Court is deprived of jurisdiction under the compulsory jurisdiction theory because the ICJ may assert jurisdiction only if both parties

not involving the use of armed force should be employed to maintain or to restore peace and security. These measures include "complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio, and other means of communication, and the severance of diplomatic relations." If the Security Council considers that measures provided for in Article 41 would be inadequate, or have proved inadequate, "it may take such [additional] action by air, sea, or land forces as may be necessary to maintain or restore international peace and security," including "demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations." *Id.* art. 41.

192. See *supra* note 53 and accompanying text (discussing 22 U.S.C. § 2291h and certification process).

193. U.N. Drug Convention, *supra* note 6. Recall that Article 32(4) permits each state, at the time of signature or ratification, acceptance, or approval of the U.N. Drug Convention or accession thereto, to declare whether it considers itself bound by paragraph 2 of Article 32, which implicates the Court's jurisdiction under the compulsory jurisdiction theory. At the time of signature, the United States declared: "Pursuant to article 32(4), the United States of America shall not be bound by article 32(2)." *Id.* art. 32, 28 I.L.M. at 525.

194. *Id.* art. 32(4), 28 I.L.M. at 525.

consent to the jurisdiction of the Court.¹⁹⁵ Of course, it is highly unlikely that any party alleged to be in non-compliance—the major drug-producing or major drug-transit countries—will consent to jurisdiction. Finally, numerous other parties have exempted themselves from Article 32(2) and the compulsory jurisdiction of the ICJ.¹⁹⁶ Several of these countries are major drug-

195. ICJ Statute, *supra* note 178, art. 36(2), 59 Stat. at 1060, 3 Bevans at 1186.

196. The 1988 U.N. Drug Convention reveals that the following parties declared themselves not bound by Article 32(2) of the Convention at the time of signature, ratification, accession, acceptance approval, or formal confirmation: Algeria ("The People's Democratic Republic of Algeria does not consider itself bound by the provisions of article 32, paragraph 2, the compulsory referral of any dispute of the International Court of Justice"); Bahrain ("The State of Bahrain, by the ratification of this Convention, does not consider itself bound by paragraph (2) of article 32 in connection with the obligations to refer the settlement of the dispute relating to the interpretation or application of this Convention to the International Court of Justice"); Brunei Darussalam ("In accordance with article 32 of the Convention Brunei Darussalam hereby declares it does not consider itself bound by paragraph 2 and 3 of the said article 32"); China ("Under the Article 32, paragraph 4, China does not consider itself bound by paragraph 2 and 3 of that article"); Cuba ("The Government of the Republic of Cuba declares that it does not consider itself bound by the provisions of article 32, paragraphs 2 and 3, and that disputes which arise between the parties should be settled by negotiation through diplomatic channel"); France ("The Government of the French Republic does not consider itself bound by the provision of article 32, paragraph 2, and declares that any dispute relating to the interpretation or application of the Convention which cannot be settled in the manner prescribed in paragraph 1 of the said article may not be referred to the International Court of Justice unless all the parties to the dispute agree thereto"); Iran ("The Government furthermore wishes to make a reservation to article 32, paragraphs 2 and 3, since it does not consider itself bound to compulsory jurisdiction of the International Court of Justice and feels that any dispute arising between the parties concerning the interpretation or application of the Convention should be resolved through direct negotiations by diplomatic means"); Lebanon ("The Government of the Lebanese Republic does not consider itself bound by the provisions of article 32, paragraph 2, and declares that disputes relating to the interpretation or application of the Convention which are not settled by the means prescribed in paragraph 1 of that article shall be referred to the International Court of Justice only with the agreement of all of the parties to the dispute"); Malaysia ("The Government of Malaysia does not consider itself bound by paragraphs 2 and 3 of article 32 of the said Convention, wherein if there should arise between two or more parties a dispute and such dispute cannot be settled in the manner prescribed in paragraph 1 of article 32 of the Convention, Malaysia is not bound to refer the dispute to the International Court of Justice for decision"); Peru ("In accordance with the provisions of article 32, paragraph 4, Peru declares, on signing the Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, that it does not consider itself bound by article 32, paragraphs 2 and 3, since, in respect of this Convention, it agrees to the referral of disputes to the International Court of Justice only if all the parties, and not just one, agree to such a procedure"); Saudi Arabia ("The Kingdom of Saudi Arabia does not regard itself bound by article 32, paragraphs 2 and 3, of the Convention"); Singapore ("The Republic of Singapore declares, in pursuance of article 32, paragraph 3 of the Convention that it will not be bound by the provisions of article 32, paragraphs 2 and 3"); Turkey ("Pursu-

producing or major drug-transit countries, for example, Algeria, Cuba, Iran, Peru, and Turkey.¹⁹⁷

B. *International Asset Sharing*¹⁹⁸

Compliance with the obligations imposed under the 1988 U.N. Drug Convention could be encouraged through international asset sharing.¹⁹⁹ Sharing the proceeds of forfeited assets among nations enhances international cooperation by creating an incentive for countries to work together in combating international drug trafficking. Article 5(b)(ii) of the Convention contemplates that parties may enter into agreements on a regular or case-by-case basis sharing the proceeds or property derived from drug trafficking and money laundering.²⁰⁰ One commentator has noted that: "[s]uch asset-sharing agreements may be among the most potent inducements to international cooperation and may result in significant enhancement of law enforcement capabilities in [drug] producing and transit states."²⁰¹

The United States has enacted domestic legislation to implement Article 5(b)(ii).²⁰² Authority to transfer forfeited assets to foreign countries is found in 18 U.S.C. § 981(i)(1).²⁰³ The

ant to paragraph 4 of article 32 of [said Convention], the Republic of Turkey is not bound by paragraphs 2 and 3 of article 32 of the Convention"); and Vietnam ("Reservations to article 6 on Extradition, article 32 paragraph 2 and paragraph 3 on Dispute settlement"). UN Web Page, *supra* note 18.

197. See INCS REPORT, *supra* note 1.

198. This subsection is adapted in part from ASSET FORFEITURE, *supra* note 139, at 346-47.

199. U.N. Drug Convention, *supra* note 6.

200. Article 5(5) of the Convention provides:

(a) Proceeds or property confiscated by a party pursuant to paragraph 1 or paragraph 4 of this article shall be disposed of by that party according to its domestic law and administrative procedures.

(b) When acting on the request of another party in accordance with this article, a party may give special consideration to concluding agreements on:

....

(ii) Sharing with other parties, on a regular or case-by-case basis, such proceeds or property, or funds derived from the sale of such proceeds or property, in accordance with its domestic law, administrative procedures or bilateral or multilateral agreements entered into for this purpose.

U.N. Drug Convention, *supra* note 6, art. 5(5), 28 I.L.M. at 506.

201. Stewart, *supra* note 20, at 396.

202. See, e.g., 18 U.S.C. § 981(i)(1) (1994).

203. *Id.* Section 981(i)(1) provides:

Whenever property is civilly or criminally forfeited under this chapter, the Attorney General or the Secretary of the Treasury, as the case may be, may trans-

following requirements must be satisfied to transfer forfeited proceeds to another country: (i) direct or indirect participation by the country's government in the seizure or forfeiture of the property; (ii) authorization by the U.S. Attorney General or U.S. Secretary of the Treasury; (iii) approval of the transfer by the U.S. Secretary of State; (iv) authorization in an international agreement between the United States and the other country to which the property is being transferred;²⁰⁴ and, if applicable, (v) certification of the country under the Foreign Assistance Act of 1961.²⁰⁵

Between July 1990 and July 1995, the U.S. Department of Justice shared US\$35.7 million in forfeited proceeds with twenty foreign countries.²⁰⁶ As a general rule, the amount of the forfeited funds shared with the other country should reflect the contribution of that government in the specific case giving rise to forfeiture relative to the assistance provided by other domestic and non-U.S. law enforcement participants.

CONCLUSION

While the United States is a party to several multilateral and bilateral treaties intended to enhance international cooperation in narcotics enforcement, clearly the most important of these international anti-drug treaties is the 1988 U.N. Drug Conven-

fer the forfeited personal property or the proceeds of the sale of any forfeited personal or real property to any foreign country which participated directly or indirectly in the seizure or forfeiture of the property, if such transfer—

(A) has been agreed to by the Secretary of State;

(B) is authorized in an international agreement between the United States and the foreign country; and

(C) is made to a country which, if applicable, has been certified under section 481(h) of the Foreign Assistance Act of 1961.

Id. Authority to transfer forfeited assets to foreign countries is also found at 19 U.S.C. § 1616a(c)(2) (1994) and 21 U.S.C. § 881(e)(1)(E) (1994).

204. A bilateral agreement such as a MLAT would satisfy this requirement. *See supra* note 55 (providing U.S. MLAT dates and cites).

205. 22 U.S.C. § 2291h (1994).

206. *See* Snider, *supra* note 9, at 389. Recipients included Antilles, Argentina, the Bahamas, the British Virgin Islands, Canada, the Cayman Islands, Colombia, Costa Rica, Ecuador, Egypt, Guatemala, Hungary, Israel, Liechtenstein, Luxembourg, the Netherlands, Paraguay, Romania, Switzerland, Venezuela, and the United Kingdom. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, THE NATIONAL DRUG CONTROL STRATEGY, BUDGET SUMMARY 98 (1998) ("Equitable sharing with foreign, state, and local governments is expected to be \$196 million in FY 1998, approximately 46.8 percent of the total deposits to the fund.").

tion. The Convention is significant in that it proposes a multi-prong strategy for combating international drug trafficking. Essential to this strategy is the emphasis on attacking the economic aspects of drug trafficking. To this end, the Convention imposes an obligation on the parties to enact domestic legislation criminalizing money laundering. It further provides for eliminating the financial incentive for engaging in drug activity through the forfeiture of illicit drug proceeds and instrumentalities of narcotics trafficking. In addition, the Convention recognizes that no country, by itself, can effectively deal with illicit drug trafficking alone. Instead, multilateral efforts based on international cooperation must be pursued. The necessity of international, cooperative, counter-drug enforcement efforts is clearly articulated in Article 2(1), which provides that "[t]he purpose of th[e] Convention is to promote cooperation among parties so that they may address more effectively the various aspects of illicit traffic in narcotic drugs and psychotropic substances having an international dimension."²⁰⁷

Unfortunately, an examination of party compliance, ten years after the adoption of the Convention, reveals that in many instances nations have either been reluctant or simply unwilling to comply with the obligations imposed thereunder. Over the past ten years, compliance has been inconsistent, if not erratic. Several major drug-producing and drug-transit countries have yet to enact anti-money laundering legislation. Furthermore, parties that have enacted domestic money laundering laws have often failed to enforce these provisions aggressively.

International cooperation on forfeiture matters has been more illusory than real. Since the adoption of the 1988 U.N. Drug Convention, the United States has become a party to numerous MLATs intended to implement the Convention. In almost every case, however, these MLATs fall far short of satisfying the obligations imposed by the Convention with respect to asset forfeiture. The MLAT provisions are formulated in loose terms with escape clauses. Often, these provisions constitute nothing more than suggestions and recommendations, thereby imposing no duty or obligation to lend law enforcement assistance whatsoever. Perhaps most disturbing, the United States' record of prosecuting international money laundering cases reveals that it has

207. U.N. Drug Convention, *supra* note 6, art. 2(1), 28 I.L.M. at 500.

not taken seriously its obligation to punish international money launderers severely. Federal prosecutors, for whatever reason, have failed to utilize the full panoply of legal tools enacted to implement the Convention effectively.

Finally, while Article 32(2) of the Convention confers jurisdiction on the ICJ to settle disputes relating to treaty interpretation and application, several parties, including the United States, have declared themselves not bound by this article. Apparently, these parties do not desire to have their conduct towards compliance, or lack thereof, scrutinized by the ICJ. As the result, the ICJ has been denied jurisdiction under the compulsory jurisdiction theory. Thus, the United States, as well as numerous other signatories to the Convention, have compromised enforcement of the Convention through the ICJ.

This compromise of enforcement is particularly unfortunate because the ICJ, as the principal judicial organ of the United Nations, is highly regarded by the international community. It is viewed as an impartial and independent tribunal. The Court represents an important vehicle for judicial enforcement of the Convention. In the event that a party fails to comply with a judgment of the ICJ, enforcement could further be aided by the Security Council. The U.N. Security Council could impose economic sanctions or take other measures to give effect to the judgment. As a practical matter, without recourse to the ICJ and Security Council, the 1988 U.N. Drug Convention is an unenforceable treaty, and international cooperation in narcotics enforcement remains merely illusory.